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IN THE

Supreme Court of the United States

October Term, 1984

L.E. MORRISON and JEAN MORRISON,

Petitioners,

vs.

COUNTY OF SAN DIEGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Does a property owner whose property is taken under the power of eminent domain receive the just compensation which the Constitution guarantees when he receives substantially less than the fair market value of his property on the date payment is tendered by the condemning agency?

2. Does a seven year delay between the date of valuation of condemned property and the date of payment by the condemning agency violate the guarantees of the Fifth Amendment of just compensation on the taking of private property for public use?

3. Does the Fifth Amendment and this Court's recent decision in *Kirby Forest Industries, Inc. v. United States*, compel a modification to the condemnation award herein where there is a seven year delay between the date of valuation and the date of payment, during which time the value of the land changed dramatically?

4. Is the attempt to pay a condemnation award only in 1980, when the award is based on 1973 values, and when the property has increased dramatically in value during the period, such a clear violation of the Fifth Amendment as to require this Court's intervention to assure just compensation to the property owner?

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No. _____

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COUNTY OF SAN DIEGO,

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

Petitioners L.E. Morrison and Jean Morrison respectfully pray that a writ of certiorari issue to review the order of the California Supreme Court denying hearing and the judgment and opinion of the California Court of Appeal, Fourth Appellate District, which affirmed a judgment in condemnation which required the valuation of petitioners' condemned property as of February 16, 1973, even though payment was not tendered until May 9, 1980, and in the intervening period, the effects of inflation were dramatic and the value of the property had increased even more dramatically.

OPINIONS BELOW

The order of the California Supreme Court issued on June 21, 1984, denying a hearing in the California Supreme Court, is set forth in Appendix A, *infra*. The opinion of the California Court of Appeal, Fourth Appellate District, filed March 29, 1984, is set forth in Appendix B, *infra*. The Court of Appeal opinion was modified by an "Order Modifying Opinion," filed April 17, 1984, which is set forth in Appendix C, *infra*. The Judgment in Condemnation of the San Diego County Superior Court is set forth in Appendix D, *infra*.

JURISDICTION

The order of the California Supreme Court denying hearing was filed on June 21, 1984. This was the final action of the highest court of the state. This action had the effect of affirming or allowing to stand the opinion of the California Court of Appeal, of which review is sought. Jurisdiction of this Court is proper pursuant to 28 U.S.C.A. § 1257(3).

BACKGROUND

This petition arises from an action commenced in the California state courts in eminent domain whereby the respondent County of San Diego has taken from petitioners L.E. Morrison and Jean Morrison some 69 acres of land upon which the Morrisons for a number of years had operated a sand extraction business and related activities. This case has been in the courts for more than 10 years and its uniqueness flows in substantial part from its history. Thus, its factual and procedural history will be summarized:

- About 1962 - the Morrisons begin operation of a sand extraction business on a large parcel of replenishing sand property in Bonita, California, a then rural area near San Diego, acquiring over the years other parcels of adjoining property.

- February 16, 1973 - County of San Diego filed a complaint in eminent domain to acquire the Morrisons' real property in fee.

- April 14, 1974 - First trial of eminent domain action commenced in San Diego County Superior Court.

- November 15, 1974 - Judgment was entered, awarding the Morrisons $837,000 for the real property interests taken, based upon a February 16, 1973 date of valuation.

- November 17, 1974 - Condemnor County of San Diego appealed from the judgment.

- The Morrisons did not prosecute a cross-appeal.

- February 14, 1977 - California Court of Appeal filed its opinion reversing the original judgment and remanding the case for a new trial.

- May 9, 1980 - Condemnor County of San Diego first makes a deposit of probable just compensation for the fee interest taken in the amount of $519,000.

- August 13, 1980 - Condemnor County of San Diego takes possession of the Morrisons' real property and the Morrisons and their business are dispossessed.

- October 5, 1981 - Retrial or second trial of action commenced in San Diego County Superior Court.

- October 28, 1981 - Jury returned a verdict for the value of the real property taken in the amount of $875,000. The date of valuation required to be used by the jury was February 16, 1973.

- December 16, 1981 - Judgment in Condemnation entered.

- February 11, 1982 - Condemnor filed notice of appeal.

- March 5, 1982 - Morrisons filed notice of cross-appeal.

- March 19, 1984 - California Court of Appeal filed its opinion on appeals from the second judgment.

- April 17, 1984 - California Court of Appeal filed order modifying opinion.

- April 30, 1984 - Morrisons filed timely petition for hearing to the California Supreme Court.

- May 21, 1984 - This Court decided the case of *Kirby Forest Industries, Inc. v. United States*.

- June 21, 1984 - California Supreme Court denied petitioners' request for hearing.

- Petitioners bring this timely request for writ of certiorari to the California courts to review the order denying hearing and the opinion and judgment of the California Court of Appeal.

The effects of these actions were that:

- Petitioners' real property has been taken from them.

- Petitioners' real property was valued by the jury as of February 16, 1973.

- Petitioners did not receive even partial payment for the real property interests taken until May 9, 1980, more than seven years later.

- During this seven year period, the area around the Morrisons' property urbanized to a substantial degree and this, together with general inflationary effects, caused the value of the Morrisons' property to increase dramatically.

The gross unfairness and inequity of this situation, together with the federal constitutional implications were urged by petitioners before all of the California state courts. In particular, detailed excerpts of briefs filed in the appellate courts are set forth herein as Appendices E and F.

Despite the urgings of petitioners, the California state courts focused on the language of state statutes and state case law, and refused to address the federal constitutional issue. Under general constitutional principles of the Fifth Amendment to the United States Constitution

made applicable to the states by the Fourteenth Amendment, as well as under the express holding of this Court's recent *Kirby Forest Industries, Inc.* case, petitioners seek a remedy to modify the condemnation award to render it consistent with the requirements for just compensation guaranteed by the Fifth Amendment.

ARGUMENT

I

IN A CONDEMNATION CASE, WHERE THERE IS A SUBSTANTIAL DELAY BETWEEN THE DATE OF VALUATION AND THE DATE PAYMENT IS TENDERED, THE CONSTITUTION REQUIRES THAT MATERIAL CHANGES IN THE VALUE OF THE LAND OVER THE PERIOD BE CONSIDERED AND THE CONDEMNATION AWARD MODIFIED ACCORDINGLY

Private property rights were granted a favored place in the jurisprudence of our country from the days of its founding. Express constitutional guarantees were provided from the outset. As the country has grown and developed, both the federal government and various agencies of the several states have adopted statutes and regulations to implement and enforce these guarantees, while facilitating a shift of private property into public ownership for public use through the exercise of the power of eminent domain.

But, however helpful and desirable these detailed provisions of statute may be, it is inescapable that the *ultimate* test of the eminent domain power lies in the Constitution itself.

This Court has clearly enunciated the applicable standard:

> The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken. *United States vs. Miller*, 317 U.S. 369, 373, 63 S.Ct. 276 (1943).

Despite these principles, in this case, the California state courts were preoccupied with state statutes and state case law and failed to appreciate or act upon the constitutional implications of the mechanical application of these state statutes and state case law to the unique facts of this case. The result was a direct and glaring violation of the Fifth Amendment of the United States Constitution.

This Court's direction in the *Seaboard Airline Railway* case was called to the attention of the California state courts without avail:

> It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and section 10 of the Lever Act directs payment. . . . The requirement that "just compensation" shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306, 43 S.Ct. 354, 356 (1923).

The California Court of Appeal responded, relying upon state case law, without consideration of the federal constitutional principles:

> This result is harsh, especially when several inflationary years separate the issuance of summons and retrial. Although the new law changes this result, it does not apply to this case and the Morrisons are therefore bound by *Murata*. [*People v. Murata* (1960) 55 Cal.3d 1.] Slip Opinion of California Court of Appeal, Appendix B, p. 9.

Through the unfortunate quirk of timing, at the time this case was before the California Court of Appeal for decision, this Court's teaching in the case of *Kirby Forest Industries, Inc. v. United States*, ____ U.S. ____, 52 U.S.L.W. 4607 (May 21, 1984), was not yet available.

Now, it is clear both under general constitutional principles and this Court's express holding in *Kirby Forest Industries* that a seven year delay between the date of valuation and the date of tender of payment, coupled with a dramatic increase in property value, compels a modification of the condemnation award in order to provide petitioners with the just compensation guaranteed by the Constitution.

II

THIS CASE IS SQUARELY WITHIN THE HOLDING OF THIS COURT'S RECENT *KIRBY FOREST INDUSTRIES* CASE, AND ITS FACTS ARE EVEN MORE COMPELLING

In the case of *Kirby Forest Industries v. United States*, ____ U.S. ____, 52 U.S.L.W. 4607, decided May 21, 1984, this Court unanimously, through Mr. Justice Marshall, held that a solution to the problem of delay between the date of valuation and the date of payment "requires . . . a procedure for modifying a condemnation award when there is a substantial delay between the date of valuation and the date the judgment is paid, during which time the value of the land changes materially." ____ U.S. ____, 52 U.S.L.W. at 4612.

Such a procedure is precisely what petitioners herein request. In the *Kirby Forest Industries* case, the period between the date of valuation and the date of payment was only slightly more than three years and there was some dispute as to whether the value of the property had indeed increased.

In compelling contrast to those facts, in the instant case, the period of delay between the date of valuation and the date of tender of payment was from February 16, 1973 to May 9, 1980, a period of more than seven years, and there is no dispute whatsoever that the value of the property appreciated (or even multiplied) dramatically over the period.

The trial judge recognized the inequity of this result because of the rising market when he stated:

> THE COURT: Well, I sympathize with the philosophical points made by Mr. Goebel that under all of the circumstances, it certainly can be viewed as placing the property

> owners in a somewhat inequitable position because of the rising market.
>
> On the other hand, it just appears to me that this statutory language is crystal clear. . . .
>
> . . . .
>
> I just feel I have no alternative but to make that ruling, although I admit that in fairness and equity were I to write the law myself, I might have written it somewhat differently, but I did not. Reporter's Transcript, p. 15, ll. 22-26, p. 16, ll. 1-14.

The California Court of Appeal declared:

> This result is harsh, especially when several inflationary years separate the issuance of summons and retrial. Although the new law changes this result, it does not apply to this case and the Morrisons and therefore bound by *Murata*. Slip Opinion of California Court of Appeal, Appendix B, p. 9.

However, both the trial court and the California Court of Appeal focused upon state statutes and state case law and failed to reach the federal constitutional question, even though it was clearly before them.

The facts here are even more compelling that those in the *Kirby Forest Industries* case. This Court should act, as it did in *Kirby Forest Industries* and mandate a procedure for modifying the condemnation award so as to satisfy the constitutional guarantee of just compensation.

Since this is a case in the California state courts and not the federal courts, the Federal Rules of Civil Procedure, Rule 60(b), procedure suggested by the Court in *Kirby Forest Industries* will not be available, and a direct remand with instructions would appear to be the most appropriate remedy.

III

THE FEDERAL CONSTITUTIONAL QUESTION WAS PROPERLY RAISED AND IS PROPERLY BEFORE THIS COURT

Review on writ of certiorari by this Court is sought pursuant to Rule 17(c) on the ground that a state court, the California Court of Appeal, has decided a federal question in a way in conflict with the applicable decisions of this Court and in violation of the United States Constitution. In particular, the California Court of Appeal in its opinion refused to consider the federal constitutional question, but rather, relied upon state statute to the contrary. The statute purportedly relied upon was former § 1249 of the California Code of Civil Procedure which purports to establish a date of valuation without regard to consideration of an unreasonable delay between the date of valuation and the date of actual payment. [The text of former § 1249 of the California Code of Civil Procedure is set forth in Appendix G, *infra*.]

Petitioners have asserted the fundamental unfairness and inequity of the application of this statute to the unique facts of this case at all levels in the California state courts to no avail. The state courts have consistently relied upon the state statute and state cases interpreting the statute, rather than reaching the federal constitutional question. The detailed assertion of petitioners' federal constitutional position to the appellate courts are set forth in excerpts of briefs filed with the California Court of Appeal and the California Supreme Court, respectively, as Appendices E and F, *infra*.

IV

CONCLUSION

The proper disposition of this matter has been rendered clear by the direction supplied by the *Kirby Forest Industries, Inc.* case. If three years delay between the date of valuation and the date of payment and a disputed change in value is sufficient to warrant a hearing to amend the condemnation award, it should follow clearly that a seven year delay and a dramatic increase in value compels a hearing to amend the condemnation award so as to satisfy the requirements of the Fifth Amendment for just compensation. As this Court stated in *Kirby Forest Industries, Inc.*:

> In our view, such a reassessment is both necessary and sufficient to provide petitioner just compensation. ____ U.S. ____, 52 U.S.L.W. 4612.

The petitioners have struggled through the California courts for more than a decade, suffering the disadvantages of timing and the arbitrary application of state statutes without consideration of federal constitutional implications. The time is now ripe for this Court to correct the injustice done by the unfortunate timing of past events, apply the clear direction of the *Kirby Forest Industries, Inc.* case to the clear facts of this case and provide these petitioners with the just compensation for which they have waited so long.

Respectfully submitted,

GOEBEL & MONAGHAN

By: LOUIS E. GOEBEL

Attorneys for Petitioners

APPENDICES

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUN 21 1954

I have this day filed Order _____

_____

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HEARING DENIED

_____

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_____

In re: 4 Civ. *No.* 26710

COUNTY OF SAN DIEGO

vs.

L.E. MORRISON, et al.

Respectfully,

Clerk

BEST AVAILABLE COPY

CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
Keenan G. Casey, Clerk
MAR 19 1984
COURT OF APPEAL FOURTH DISTRICT

COUNTY OF SAN DIEGO, Plaintiff and Appellant, v. L. E. MORRISON, ET AL., Defendants and Cross-Appellants.	4 Civ. No. 26710 (Super. Ct. No. 339813)

APPEAL from a judgment of the Superior Court of San Diego County, James L. Focht, Judge. Affirmed in part as modified; reversed in part and remanded.

Joseph Kase, Jr., County Counsel, Lloyd M. Harmon, Jr., Chief Deputy County Counsel and Sandra J. Brower, Deputy County Counsel, for Plaintiff and Appellant.

Goebel & Monaghan, Louis E. Goebel and James E. Rubnitz for Defendants and Cross-Appellants.

This appeal arises from a long-standing eminent domain proceeding initiated by the County of San Diego (County) in 1973 to acquire 69.17 acres from L. E. and Jean Morrison (Morrisons) for the development of Sweetwater Regional Park.

The case first went to trial in 1974 to resolve the principal issue of the property's fair market value. The County appealed the judgment

[1]Certified for publication with the exception of sections II through IV.

rendered in that trial on grounds not at issue here and this court reversed. The judgment entered in December 1981 after retrial included $56,250 as compensation for loss of business goodwill. The County appeals this portion of the judgment, contending the applicable law does not provide compensation for loss of business goodwill.

The Morrisons' cross-appeal focuses on three areas. The judgment was based on the fair market value of the property on February 16, 1973, the date the original complaint and summons were filed. The judgment also included an award of interest at the legal rate of seven percent per annum on two figures: $356,000 (the difference between the amount the County had deposited as probable compensation ($519,000) and the amount found by the jury to be the fair market value ($875,000)) and $56,250 (the loss of business goodwill). The Morrisons challenge the selected valuation date, arguing it should be May 9, 1980, the date the County deposited probable compensation, rather than February 16, 1973. They also challenge the award of seven percent interest, contending the rate is too low to justly compensate them and should be based on the prevailing market rate of interest. Finally, the Morrisons appeal the court's denial of their motion to recover litigation expenses.

Because we decide the law governing this action does not provide compensation for loss of business goodwill, we modify the judgment to exclude that award and accompanying interest. We also hold the court properly selected February 16, 1973 as the valuation date and correctly denied the Morrisons' motion to recover litigation expenses. As to those issues, we affirm the judgment as modified. However, in light of *Redevelopment Agency v. Gilmore* (1984) 150 Cal.App.3d 1091, 1095-1096, we reverse the award of seven percent interest on the $356,000 unpaid value of the Morrison's property and remand the matter for a determination of the applicable market rate of interest.

Factual and Procedural Background

Many of the problems in this case result from the long span of years separating the date of complaint from the judgment entered after retrial. During this time period, property values appreciated, interest rates reached record highs and the Legislature enacted a new body of law to govern eminent domain proceedings.

When the County began proceedings on February 16, 1973, eminent domain law in California was controlled by former title 7 of part 3 of the Code of Civil Procedure,[2] consisting of sections 1237 and 1267. This entire law was repealed and reenacted in 1975 (stats. 1975, c. 1275, §§ 1, 2, p. 3409, operative July 1, 1976) with the revised statute, entitled "Eminent Domain Law," included in new title 7 of part 3. (§ 1230.010 et seq.)

The new law became operative while this case was on appeal following the first trial. However, the former law properly governed appellate review in light of section 1230.065 which provides:

> "(a) This title becomes operative July 1, 1976.
>
> "(b) *This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976.* Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding which is commenced on or after January 1, 1976, but prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues to be tried or retried.
>
> "(c) Chapter 3 (commencing with Section 1240.010), Chapter 4 (commencing with Section 1245.010), and Chapter 5 (commencing with Section 1250.010) do not apply to a proceeding commenced prior to the operative date.
>
> "(d) *If, on the operative date, an appeal,* motion to modify or vacate the verdict or judgment, or motion for new trial *is pending, the law applicable thereto prior to the operative date governs the determination of the appeal or motion.* (Italics added.)

Following reversal, the case was set for retrial. Although originally scheduled for July 1978, several continuances granted at the Morrisoins' request delayed the trial date by more than three years. Pending retrial, the Morrisons successfully moved for leave to supplement their answer by adding a request for compensation for loss of business goodwill. The

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[2]All statutory references are to the Code of Civil Procedure unless otherwise indicated.

motion was based on the new eminent domain law, section 1263.510 which, unlike the old law, provides for compensation for loss of business goodwill. The County opposed the motion on the basis the new law did not apply to this case, citing section 1230.065.

Although the County attempted to defeat the amendment through several writ and motion proceedings, the case went to trial with the issue of goodwill compensation placed before the jury. Comments made by this court in denying the County's first writ petition and by the trial court at a motion hearing indicated the first court's earlier granting of leave to supplement the answer was in error, but that the error could be corrected only on appeal. In order to prevent the need for a retrial on this issue, the trial court specifically submitted a special verdict regarding goodwill compensation.

At retrial the jury found the fair market value of the property on February 16, 1973 was $875,000 and the compensable loss of business goodwill was $56,250. The judgment in condemnation entered by the court included an award of seven percent interest per annum running from August 13, 1980, the date the County took possession of the property. The record does not reveal what steps, if any, the Morrisons took either before or after judgment to challenge the award of seven percent interest.

After trial, the Morrisons moved to recover litigation expenses under the federal and state constitutions and under former section 1249.3 and present section 1250.410. The court denied the motion, finding the Morrisons did not timely file and serve the County with a final demand as required as a condition to recovery under the code.

Discussion

I

Payment for loss of business goodwill resulting from condemnation is not constitutionally required. (*Community Redevelopment Agency v. Abrams* (1975) 15 Cal.3d 813, 831-832, cert. den., 429 U.S. 869.)[3] The

[3]"The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, [citation], provides in relevant

(Footnote 3 continued on page B-5)

Legislature, in enacting the new eminent domain law (§ 1230.010 et seq.), made such compensation available for the first time. (See § 1263.510.) Because the new law did not become operative until July 1, 1976, compensation for loss of business goodwill was not available to the Morrisons at their first trial.

The County, pointing to section 1230.065 (see *ante*), contends such compensation also was not available at the second trial. It explains that since the proceeding began on the date the complaint was filed, February 16, 1973, subdivision (b) controls and prohibits application of the new law in stating: "This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976." The Morrisons argue that we cannot rely solely on the statute but must also consider the legislative comments to section 1230.065. If we do so they believe we will conclude their second trial was governed by the new law. Although we accommodate the Morrisons' request to consider the legislative history, we nonetheless hold the statutory language is clear in prohibiting application of the new law to this case.[4]

The language of section 1230.065 is clear and unambiguous on its face. The general principle in cases where there is no need for construction is to refrain from indulging in it. (*People v. Belleci* (1979) 24 Cal.3d 879, 884; *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198.) While the Morrisons apparently agree the new law is inapplicable to a proceeding started before January 1, 1976 which reaches a *first trial* after that date, they argue a case scheduled for *retrial* after January 1, 1976 following

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(Footnote 3 continued)

part: '. . . nor shall private property be taken for public use, without just compensation.' [¶] Article I, section 19 (replacing former art. I, § 14) of the California Constitution provides in relevant part: 'Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.'" (*Id.*, at p. 816, fn. 2.)

[4]The Morrisons also present an "operative facts" argument, i.e., the new law should apply here because they lost their business when the County took possession in August 1980, four years after the new law's operative date. Neither the statute nor the comments, however, refer to "operative facts" or attach any significance to when such facts occur. The controlling event for application of the new law is the commencement of the eminent domain proceeding (see § 1230.065, subds. (b) and (c)), not the occurrence of any particular operative fact.

appeal is governed by the new law. They rely on the legislative committee comment to section 1230.065 which discusses subdivision (d) and provides if a posttrial motion or appeal results in a new trial, "this title would govern the further proceedings in the action under subdivision (b)."[5] Referring back to subdivision (b), however, we are confronted with the first sentence: "This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976."

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[5]The Legislative Committee comment to section 1230.065 provides:

"Subdivision (a) of Section 1230.065 delays the operative date of this title until July 1, 1976, to allow sufficient time for interested persons to become familiar with the new law.

"Subdivision (b) adopts the policy that this title is to apply to the fullest extent practicable to pending proceedings except those commenced more than six months before the operative date. In most proceedings commenced within six months before the operative date, except perhaps those in trial are [*sic*] awaiting imminent trial, the immediate application of this title would not delay the parties or court in proceeding to judgment. Immediate application moreover, would prevent inconsistencies of result as between proceedings commenced shortly prior to the operative date and those commenced shortly thereafter. The phrase 'to the fullest extent practicable' is intended to give the court discretionary power to adapt the application of the title to the circumstances of individual cases, thereby reducing the possibility that immediate application of these provisions to pending litigation might in special cases cause injustice.

"Subdivision (c) excludes from application to pending proceedings provisions dealing with the right to take, precondemnation activities, and pleadings.

"Subdivision (d) provides, in the interest of fairness, that any decision of a posttrial motion or appeal pending on the operative date should be based upon the law that was applicable where [*sic*] the action was tried. It would be unfair to hold litigants to a different rule of law in the determination of claimed error than the law which governed at the time the claimed error was committed. ***If the motion or appeal results in a new trial, however, this title would govern the further proceedings in the action under subdivision (b).***" (Italics added.)

These two statements appear contradictory and are best explained by the fact that amendments made to section 1230.065 while it was being considered by the Legislature were not fully dealt with by the comments. The new eminent domain law was designed to be retroactive, but during the legislative process an amendment made it nonretroactive. Some of the comments addressing retroactivity were altered to reflect this change, but the comments regarding retrial remained untouched, possibly due to oversight.

Section 1230.065 was introduced on December 2, 1974, as AB 11 by Assemblyman McAlister. As introduced, the eminent domain law was intended to apply to proceedings already commenced:

> "(b) Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding commenced prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues to be tried or retried." (§ 1230.065, subd. (b) of AB 11 as introduced Dec. 2, 1974.)

Subdivision (d) and the committee comments to that subdivision were the same in 1974 as they are now.[6] In the context of the statute as introduced, the comment correctly and logically explained the new law would govern a new trial after the operative date even if the case had commenced prior to that date. This paralleled treatment of cases coming to *first* trial after the operative date, which also were governed by the new law. (See subd. (b) of AB 11 as introduced, *ante*.)

On April 10, 1975, AB 11 was amended to prohibit retroactive application. At the time of this amendment, the comment to subdivision (b) also was amended to reflect the altered intent. (Compare fns. 5 and 6, *ante*.) However, the comment to subdivision (d) was not amended, even though it had been drafted when the statute was to be applied retroactively.

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[6]The original committee comment to section 1230.065, subdivision (b) differed from the final comment. The original comment provided in part:

> "Subdivision (b) adopts the policy that this title is to apply to the fullest extent practicable to pending proceedings. In most proceedings, except perhaps those in trial or awaiting imminent trial, the immediate application of this title would not delay the parties or court in proceeding to judgment. . . ."

The law we are left with expressly precludes retroactive application and yet, through the comment to subdivision (d), seems to suggest a legislative intent to apply the new eminent domain law to cases on retrial. The best explanation for this contradictory comment is oversight. Explicit steps were taken to amend subdivision (b) to eliminate retroactivity and the comments to subdivision (b) were accordingly modified. Subdivision (d) was not amended, and perhaps it did not occur to the legislators to review the comments relating to that subdivision. If the Legislature had intended the new law to apply to cases at retrial, it would have amended the statute to reflect that intent. Since it did not, we are left with an unambiguous statute and ambiguous legislative history and will therefore rely on the statute to deny application of the new law to the Morrisons. Our conclusion comports with the general rule that resort to legislative history is unnecessary when statutory language is certain and unambiguous. (*People v. Flores* (1979) 92 Cal.App.3d 461, 472.) "[W]e are not free to substitute legislative history for the language of the statute." (*Aronsen v. Crown Zellerbach* (9th Cir. 1981) 662 F.2d 584, 588, fn. 7, cert. den., 103 S.Ct. 1183.)

This result is unfair to the extent the Morrisons are denied compensation for a loss for which others will receive compensation. However, it is within the Legislature's power in the field of economic regulation to select a date certain from which new benefits will be bestowed. Such a chronological classification provides for orderly transition and bears a rational relationship to an appropriate governmental objective. (*Carson Redevelopment Agency v. Wolf* (1979) 99 Cal.App.3d 239, 243-245.)

II

On cross-appeal, the Morrisons challenge the valuation date of February 16, 1973 which was used both at trial and at retrial. Relying on new section 1263.110, the Morrisons propose the date the County deposited probable compensation, May 9, 1980, as the correct date. Because we have already decided the new law does not apply to this case, the valuation date must be determined by the prior law, which provided:

> "For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons . . . provided, that in any case in which the issue is not tried within one year after the date of the commencement of the

> action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. . . ." (Former § 1249, repealed by stats. 1975, c. 1275, § 1, p. 3409.)

The summons in this case was filed by the County on February 16, 1973 and that date was used as the valuation date at the first trial even though that trial began more than one year after the issuance of summons. The record does not reveal who or what caused the delay, but the parties apparently agreed on February 16, 1973 as the correct date. The Morrisons later agreed in a stipulation filed with the court to retain February 16, 1973 as the valuation date for purposes of retrial. Once that valuation date was determined at the first trial it became the applicable date for all further proceedings, including retrial. (*People v. Murata* (1960) 55 Cal.2d 1, 10.) This result is harsh, especially when several inflationary years separate the issuance of summons and retrial. Although the new law changes this result, it does not apply to this case and the Morrisons are therefore bound by *Murata*.

III

Relying on *Redevelopment Agency v. Gilmore, supra*, 150 Cal.App.3d at pp. 1095-1096, the Morrisons argue they are entitled under the Fifth and Fourteenth Amendments to the United States Constitution to interest on the $356,000 unpaid value of their property at the prevailing market rate rather than the legal rate. The County points out the Morrisons did not challenge the award of seven percent interest in the trial court, and argues that omission precludes them from raising the interest rate issue for the first time on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

As a general rule, trial lawyers must make a record to preserve an issue for appeal. Like all rules, however, this general statement must be qualified where there is a sharp break in the law and the lawyer should not reasonably be charged with anticipating that change (*Chamberlain v. Ventura County Civil Service Com.* (1977) 69 Cal.App.3d 362, 372) or where, as a practical matter, making the record would be an exercise in futility. (Civ. Code, § 3532; *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418, mod. 34 Cal.3d 732b.) Lawyers are not required to test judicial temperament by futilely attempting to make useless objections. Although *Gilmore's* market rate interest holding was

foreshadowed before retrial here by two Ninth Circuit cases (*United States v. 429.59 Acres of Land* (9th Cir. 1980) 612 F.2d 459, 464-465; *United States v. Blankinship* (9th Cir. 1976) 543 F.2d 1272, 1274-1277), the Morrisons faced the same trial judge below who rejected the condemnee's request for market rate interest in *L & M Professional Consultants, Inc. v. Ferreira* (1983) 146 Cal.App.3d 1038. In light of that previous contrary ruling on the merits, it would have been an exercise in futility for the Morrisons to have challenged the court's award of seven percent interest in this case. (See Civ. Code, § 3532; compare *Sea & Sage Audubon Society, Inc. v. Planning Com., supra,* 34 Cal.3d at pp. 418-419.) Because we are persuaded by the holding and rationale in *Gilmore*, we remand for a determination of the applicable market rate of interest. (See *Redevelopment Agency v. Gilmore, supra,* 150 Cal.App.3d at pp. 1100-1101.)

IV

The payment of litigation expenses is not constitutionally required. (*Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 Cal.3d 648, 658; *County of Los Angeles v. Ortiz* (1971) 6 Cal.3d 141, 148.) However, the Legislature provided a method of recovery via former section 1249.3:

> "At least 30 days prior to the date of trial, plaintiff shall file with the court and serve a copy thereof on defendant its final offer to the property sought to be condemned and *defendant shall in like manner, file and serve a copy thereof on plaintiff his final demand for the property sought to be condemned.* Service shall be accomplished in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.
>
> "If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the condemnor was unreasonable and that the demand of condemnee was reasonable, all viewed in the light of the determination as to the value of the subject property, the costs allowed pursuant to Section 1255 shall include all expenses reasonably and necessarily incurred in preparing for and in conducting the condemnation trial including,

> and not limited to, reasonable attorney's fees, appraisal fees, surveyor's fees, and the fees for other experts, ...
>
> "In determining the amount of attorneys [*sic*] fees and expenses to be awarded under this section, the court shall consider written, revised or superseded offers and demands served and filed prior to or during the trial." (Former § 1249.3, repealed by stats. 1975, c. 1275, § 1, p. 3409.)

The Morrisons never filed or served a final demand on the County. The purpose of former section 1249.3 was "to encourage early settlement so trial can be avoided. Since one of the bargaining parties is a person representing a governmental agency, who cannot make a binding agreement without the agency's approval, a 30-day minimum time period is necessary to complete a settlement. *To achieve the statute's goal, the 30-day minimum time period must be mandatory.* [¶] . . . As a means of encouraging negotiations before trial, the Legislature put incentives into the statute. *The condemnee who makes a timely final demand and goes to trial only when the offer is unreasonable has the potential of being reimbursed for expenses which he could not otherwise recover*; likewise, the condemner who makes a timely reasonable offer, whether it is accepted by the condemnee or not, may avoid having to pay the condemnee's extraordinary costs. *The property owner, by not filing a final demand when he thinks the condemner's offer is unreasonable, forfeits the possibility of recovering costs*; the condemner, by not filing a final offer, may be liable for the property owner's extraordinary costs where the owner has made a final demand." (*People ex rel. Dept. of Transportation v. Callahan Brothers* (1977) 69 Cal.App.3d 541, 543-544, italics added; accord, *City of San Leandro v. Highsmith* (1981) 123 Cal.App.3d 146, 153-155;[7] *Lake County Sanitation Dist. v. Schultz* (1978) 85 Cal.App.3d 658, 668-669; see also *People ex rel. Dept. of Transportation v. Patton Mission Properties* (1979) 89 Cal.App.3d 204, 212-213; but see

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[7] *Highsmith* considered the effect of an untimely final demand under section 1250.410, the successor to former section 1249.3. This distinction, however, is largely meaningless because section 1250.410 continues the substance of former section 1249.3. (*People ex rel. Dept. of Transportation v. Sunshine Canyon, Inc.* (1979) 94 Cal.App.3d 599, 601, fn. 1.) In *State of California ex rel. State Pub. Works Bd. v. Turner* (1979) 90 Cal.App.3d 33 this court examined only the reasonableness of the condemner's final offer and did not consider the issue of the timeliness of the condemnee's final demand. (*Id.*, at p. 36, fn. 2.)

People ex rel. Dept. of Transportation v. Societa Di Unione E Beneficenza Italiana (1978) 87 Cal.App.3d 14, 20-22.)

The Morrisons attempt to salvage their claim to litigation expenses by arguing they made an informal final demand which substantially complied with the notice requirements of former section 1249.3. They argue their decision not to cross-appeal the judgment entered after the *first trial* constituted a substitute final demand before *retrial* for the amount of the original judgment. Such informal methods, however, do not meet the statutory requirements. As the court explained in *City of San Leandro v. Highsmith, supra,* 123 Cal.App.3d at p. 155, "a recital of the demand and offer in a settlement conference statement, or in any other document, is not an adequate substitute for the formal demand and offer contemplated by section 1250.410[*] unless the parties have stipulated to a less formal exchange. The Legislature did not direct the parties to 'apprise' each other or 'communicate' with each other about an offer or demand. It mandated that a 'final offer of compensation' and a 'final demand for compensation' shall be served on the opposing party and filed with the court in the manner prescribed for service of a notice of motion." Accordingly, the court below correctly denied the Morrisons' motion to recover litigation expenses.

Disposition

The judgment is modified by striking the award of $56,250 as compensation for loss of business goodwill plus interest awarded on that sum. As modified, the judgment is affirmed except as to the award of seven percent interest on the $356,000 unpaid value of the Morrisons' property. That award is reversed and the case is remanded for further proceedings to determine the applicable market rate of interest.

CERTIFIED FOR PARTIAL PUBLICATION.

WE CONCUR:

WIENER, Acting P.J.

WORK, J.

BUTLER, J.

[*]See fn. 7, *ante*.

C-1

CERTIFIED FOR PARTIAL PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
APR 17 1984

COUNTY OF SAN DIEGO, Plaintiff and Appellant, v. L. E. MORRISON, ET AL., Defendants and Cross-Appellants.	**ORDER MODIFYING OPINION** 4 Civ. No. 26710 (Super. Ct. No. 339813)

THE COURT:

The opinion filed on March 19, 1984 is modified as follows:

1. On page 3, the last sentence in the first full paragraph is modified to read:

> "However, we reverse the award of seven percent interest on the $356,000 unpaid value of the Morrisons' property and remand the matter for a determination of the applicable market rate of interest."

2. On page 13, the first partial sentence under part III is modified to read:

> "Relying on *Redevelopment Agency v. Gilmore* (1984) 150 Cal.App.3d 1091, 1095-1096, the Morrisons argue they are . . . ."

cc:All parties

DONALD L. CLARK, County Counsel
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FILED
Robert D. Zumwalt, Clerk
DEC 15 1981
BY K. KNOLL, Deputy

ENTERED
DEC. 16, 1981
Judgment Book 1391 Pg. 231

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

No. 339813

COUNTY OF SAN DIEGO,

Plaintiff,

v.

L. E. MORRISON, et al.,

Defendants.

JUDGMENT IN CONDEMNATION (PARCELS 71-0083, A, B, C, D & E - MORRISON)

This eminent domain proceeding brought by the County of San Diego for the condemnation for County regional park purposes of the real property situated in the County of San Diego, State of California, and more particularly described in plaintiff's Complaint on file herein as Parcels 71-0083 A, B, C, D & E came on regularly for trial on October 5, 1981, in Department 10 of the above-entitled Court, before the Honorable James L. Focht, Judge of the Superior Court, and a jury sworn to try the issue of compensation.

Donald L. Clark, County Counsel and Jack Limber, Deputy County Counsel, appeared as attorneys for plaintiff; Goebel & Monaghan by Louis E. Goebel appeared as attorneys for defendants L. E. Morrison and Jean Morrison. Defendants Bank of America National Trust & Savings Association, Hattie I. Brewer, Vesta Gent, have appeared and answered the complaint herein.

Plaintiff and defendants L. E. Morrison and Jean Morrison entered into a stipulation regarding the compensation to be paid for fixtures and equipment in this action, and pursuant to said stipulation plaintiff deposited with the Clerk of the court the sum of $69,505.50 as the compensation for the fixtures and equipment, and in accordance with said stipulation and approval by the court defendants L. E. Morrison and Jean Morrison were paid by the Clerk of the court said sum of $69,505.50 for fixtures and equipment (less $30,782.82 which was paid by the Clerk to Jennings, Engstrand & Henrikson in satisfaction of a lien on the condemnation proceeds, filed in this action).

Evidence was introduced before the jury on the issue of the fair market value of Parcels 71-0083 A, B, C, D & E as of February 16, 1973, and on the issue of compensable loss of good will as of February 16, 1973; the cause was argued by counsel and the jury was instructed by the Court; whereupon the jury retired and deliberated and subsequently returned to court and rendered its separate verdicts in the amount of $875,000.00 as the fair market value of Parcels 71-0083 A, B, C, D & E as of February 16, 1973, which is total compensation for the taking of Parcels 71-0083 A, B, C, D & E, and in the amount of $56,250.00 as the compensable loss of good will as of February 16, 1973, which is the total compensation for compensable loss of good will.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That plaintiff seeks to take, acquire and condemn the rights, title and interests hereinafter described in and to the real property designated Parcels 71-0083 A, B, D, D, & E referred to in Paragraph III of plaintiff's Complaint and described in Exhibit "A" to plaintiff's Complaint to which description reference is hereby made, and by this reference said description is made a part hereof as though fully set forth herein; that the condemnation and taking thereof is for the public purposes set forth in the Complaint herein, and is necessary to such public uses.

2. That upon payment into Court of the total sum of $875,000.00 for the fair market value of Parcels 71-0083 A, B, C, D, & E as of February 16, 1973 (less the sums of $20,000.00 and $499,000.00 previously withdrawn by defendants L. E. Morrison and Jean Morrison), and the sum of $56,250.00 for compensable loss of good will as of February 16, 1973, together with interest at the rate of seven percent (7%) per annum on the following sums and for the dates specified below:

(a) $356,000.00 ($875,000.00 less $519,000.00) from August 13, 1980 (date County took possession of property) to the date of deposit of said sum into Court,

(b) $56,250.00 from August 13, 1980 (date County took possession of property) to the date of deposit of said sun in Court,

there shall be condemned to the plaintiff the hereinafter described interests in said real property designated Parcels 71-0083 A, B, C, D & E; said sum shall be in full payment for the condemnation and taking of said real property. Said sum shall include compensation on account of plaintiff's possession of said real property prior to the entry of this judgment.

3. That said payment as hereinabove specified shall terminate, cancel and extinguish all liens, leaseholds and encumbrances of whatsoever nature on said real property. Said sums shall be paid to defendants as follows:

For Parcels 71-0083 A, B, C, D & E the sums of $875,000.00 (less the sums of $20,000.00 and $499,000.00 previously withdrawn by defendants L. E. Morrison and Jean Morrison), and $56,250.00 for compensable loss of good will, together with interest as herein described as follows:

(a) To the COUNTY OF SAN DIEGO for taxes the sum of $2,246.58.

(b) To defendants L. E. MORRISON AND JEAN MORRISON and defendants BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, HATTIE I. BREWER, VESTA GENT, as their interests may appear, the sum of $872,753.42, less the sums of $20,000.00 and $499,000.00 previously withdrawn, together with interest as herein specified on the sums and for the dates specified below:

$356,000.00 ($875,000.00 less $519,000.00) from August 13, 1980 (date County took possession of property) to

the date of deposit of said sum into Court.

(c) To defendants L. E. Morrison and Jean Morrison the sum of $56,250.00, together with interest as herein specified on the sums and for the dates specified below:

$56,250.00 from August 13, 1980 (date County took possession of property) to the date of deposit of said sum in Court.

4. That the sum of $519,000.00 heretofore deposited into Court by plaintiff as a security deposit for the taking of Parcels 71-0083 A, B, C, D & E shall be deemed to have been deposited in partial satisfaction of this award.

5. Upon payment of said sum into Court as hereinabove specified there shall be entered in favor of plaintiff a Final Order of Condemnation for said parcel of real property.

6. That plaintiff seeks to take, acquire and condemn the fee simple title to Parcels 71-0083 A, B, C, D & E hereinabove referred to and described by reference to plaintiff's Complaint and therein designated by the same parcel number.

DATED: DEC. 15, 1981

Judge of the Superior Court

APPROVED AS TO FORM:

DONALD L. CLARK, County Counsel
Attorney for Plaintiff

GOEBEL & MONAGHAN

LOUIS E. GOEBEL
Attorneys for Defendants

* * * *

I. INTRODUCTION

Through this petition to the highest court in the State, the Morrisons seek to obtain some small semblance of just compensation for the property interests which were taken from them involuntarily by Condemnor in a process which commenced more than ten years ago.

Private property has long held a favored place in the jurisprudence of our country. The words of the United States Supreme Court are inspiring and comforting:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be in as good a position pecuniarily as he would have if his property had not been taken."
> *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276 (1943).

The Morrisons long ago have learned that there is a dramatic difference between these glowing ideals and the practical realities of litigating with a tenacious and adversarial condemning agency. The passage of time, the vagaries of the judicial system, the delays of litigation, changes in the law, and the like, all compound the difficulty in applying general constitutional principles to real life situations to achieve equitable results.

In no way can the Morrisons hope to be "made whole" from the more than ten years of tribulations relating to the taking of their real property and the destruction of the family business operated on the property. It is only sought through this petition to the highest court of the State, and the ultimate guardian of the constitutional rights of citizens and property owners, to breathe some reality into the constitutional guarantees of just compensation by interpreting statutory provisions and general rules in light of these constitutional guarantees so as to reach a fair and just result in this -- the difficult and unusual case, as well as would have been

achieved in the simple and uncomplicated case.[1]

The Morrisons seek correction of the following errors below in order to ameliorate their losses and have the opportunity to more nearly achieve "just" compensation after more than a decade of struggle:

- A declaration that the date of valuation is not February 16, 1973, the date of original commencement of an action against their real property interests, but rather, May 9, 1980, the date the Condemnor finally *first* deposited probable just compensation for the taking of the Morrisons' real property even though the courts below held that the date of valuation was fixed at February 16, 1973;

- A declaration that it was error to deny the Morrisons' motion for recovery of litigation expenses, since by not prosecuting a cross-appeal of the original judgment, the Morrisons had clearly, unequivocally, irreversibly, and in all practical effect, made a standing offer for a period of more than two years to settle for the amount of the original judgment -- $837,000 -- which is less than the amount the jury ultimately awarded in the second trial of the action;

- A declaration that the Morrisons are entitled to recover for loss of business goodwill since their business was not destroyed until August of 1980, and the operative date of the legislation which authorized recovery for loss of business goodwill was July 1, 1976.[2]

---

[1] The Court of Appeal readily acknowledged that the results were "unfair" and "harsh" as to the Morrisons, but apparently felt constrained to the role of statutory interpretation. As will be pointed out hereafter, the California and United State [*sic*] Constitutions that "just compensation" be achieved in substance as well as form.

[2] Since the granting of a hearing by this Court will have the effect of vacating the most recent opinion of the Court of Appeal, the Morrisons will further urge that this Court incorporate in its opinion and judgment the holding of the Court of Appeal in regard to the requirement that the Morrisons be paid "market rate" interest, rather than interest restricted by a statutory seven percent limitation.

II. LEGAL ISSUES PRESENTED

By this petition, the Morrisons seek to have this Court settle important questions of constitutional law regarding the taking of real property and resolve important questions and facilitate uniformity of decision in related areas regarding the taking of real property and the destruction of business goodwill.

These Questions include:

1. DO THE JUST COMPENSATION GUARANTEES OF THE CALIFORNIA AND UNITED STATES CONSTITUTIONS PERMIT A CONDEMNOR TO TAKE PROPERTY IN 1980 AND PAY FOR IT AT 1973 VALUES?

2. ON RETRIAL AFTER A CONDEMNOR'S APPEAL, WHERE THERE IS NO DEPOSIT TO FIX A DATE OF VALUATION, DOES NOT THE CONSTITUTIONAL MANDATE OF JUST COMPENSATION REQUIRE A NEW, CURRENT DATE OF VALUATION IN THE INTEREST OF JUSTICE?

3. WHERE THE JURY VERDICT IN THE SECOND TRIAL IS HIGHER THAN THE AMOUNT THAT THE PROPERTY OWNERS CLEARLY, UNEQUIVOCALLY AND IRREVERSIBLY OFFERED TO SETTLE AT FOR MORE THAN TWO YEARS PRIOR TO THE RETRIAL, IS NOT THE ONLY LOGICAL, PRACTICAL AND EQUITABLE RESULT THAT THE PROPERTY OWNERS RECOVER THE LITIGATION EXPENSES OF THE RETRIAL THEY WERE FORCED THROUGH BY THE CONDEMNOR?

4. WHERE THE LEGISLATURE EXPRESSLY EVIDENCED THE INTENT THAT POST-1976 LAW REGARDING BUSINESS GOODWILL APPLY "TO THE FULLEST EXTENT PRACTICABLE," IS IT REASONABLE OR CONSISTENT WITH LEGISLATIVE INTENT THAT ONE WHOSE BUSINESS GOODWILL IS DESTROYED ONLY IN 1980 BE BOUND BY PROVISIONS OF PRE-1976 LAW?

III. HISTORY

The uniqueness of this case flows in substantial part from its history. Thus, its factual and procedural history will be detailed:

- About 1962 -- The Morrisons begin operation of a sand extraction business on a large parcel of replenishing sand property in Bonita, California, a then rural area near San Diego, acquiring over the years other parcels of adjoining property.

- February 16, 1973 -- County of San Diego filed a complaint in eminent domain to acquire the Morrisons' real property in fee. Clerk's Transcript 1 (hereinafter "C.T.").

- April 17, 1974 -- First trial of the eminent domain action commenced before the Honorable Gilbert Harelson. C.T. 224.

- November 15, 1974 -- Judgment was entered, awarding the Morrisons $837,000 for the real property interest taken, based upon February 16, 1973 date of valuation. C.T. 228, 231-33.

- November 27, 1974 -- Condemnor appealed from the judgment. C.T. 236.

- The Morrisons did not prosecute a cross-appeal.

- July 1, 1976 -- The operative date (for most cases) of the comprehensive revision of the California eminent domain law, CCP §§1230.010, *et seq.*

- February 14, 1977 -- Court of Appeal filed its opinion reversing the original judgment and remanding the case for a new trial. C.T. 242.

- April 18, 1977 -- Remittitur entered by San Diego Superior Court. C.T. 241.

- July 26, 1978 -- Date scheduled for retrial. C.T. 391:9-11.

- May 9, 1980 -- Condemnor makes deposit of probable just compensation in the amount of $519,000. C.T. 256.

- August 13, 1980 -- Condemnor takes possession of the Morrisons' real property, the Morrisons and their business are dispossessed, and their business goodwill is lost. C.T. 256-60.

- October 5, 1981 -- Retrial or second trial commenced before a jury, Honorable James L. Focht, presiding. Reporter's Transcript 1 (hereinafter "R.T.").

- October 28, 1981 -- Jury returned a verdict for the value of the real property in the amount of $875,000 ($38,000 more than the previous judgment). The date of valuation by the Trial Court was February 16, 1973. R.T. 932.

- December 16, 1981 -- Judgment in Condemnation entered. C.T. 406.

- February 11, 1982 -- Condemnor filed notice of appeal re goodwill award. C.T. 434.

- February 11, 1982 -- Morrisons' motion for recovery of litigation expenses denied. C.T. 449.

- March 5, 1982 -- Morrisons filed notice of cross-appeal. C.T. 444.

- March 19, 1984 -- Court of Appeal filed opinion on appeals from second judgment. Appendix A.

- April 17, 1984 -- Court of Appeal filed "Order Modifying Opinion." Appendix A.

- April 30, 1984 -- Morrisons filed timely Petition For Hearing.

IV. A NEW CURRENT DATE OF VALUATION FOR THE RETRIAL WAS CONSTITUTIONALLY NECESSARY

The Court of Appeal openly acknowledged that the result of use of the original date of valuation in the retrial was harsh:

> "This result is harsh, especially when several inflationary years separate the issuance of summons and retrial." Slip Opinon, [*sic*] page 13.

However, the Court of Appeal felt constrained to permit the harsh result because of its reliance upon interpretation of statute. This failure to understand and apply the mandates of the United States and California Constitutions compel the granting of a hearing in this case and a reversal of the judgment.

The trial court and the Court of Appeal were preoccupied with the provisions of statute. Statutory procedures are necessary in an area such as eminent domain. But, however helpful these detailed provisions of statute may be, it must be remembered that the *ultimate* test of eminent domain power lies in the Constitution.

The case of *United States v. Miller, supra,* summarizes the general standards widely accepted by the case law:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be in as good a position pecuniarily as he would have if his property had not been taken." 317 U.S. 369, 63 S.Ct. 276, 279-80.

The constitutional checks upon the exercise of the power of eminent domain are entrenched in California cases as well. This Court has declared:

> "The provision of the Constitution compelling the payment of just compensation for a public taking of property (Cal.Const., Art. I, §14) is self-executing. Since this is so it has consistently been held, in inverse condemnation cases, that inherent power is reposed in the trial court to provide for the assessment of just compensation in situations not within the purview of existing statutory provisions."
> *Citizens Utilities Co. v. Superior Court,* 59 Cal.2d 805, 812 (1963).

In the *Citizens Utilities Co.*, case, the California Supreme Court expressly approved the trial court's departure from the very statute involved here, CCP §1249, as follows:

> "The trial court, in the instant case, was empowered to devise a procedure whereby the value of petitioner's water system could be *justly* and *constitutionally* assessed. This it did by providing that in the case of petitioner the condemned property should be assessed not as of the date of the summons, but as of the date of trial. This was a proper exercise of the inherent power of the trial court."
> 59 Cal.2d at 812 (emphasis added).

This Court has clearly held that "the [property owner's] right to just compensation cannot be made to depend upon State statutory provisions..."
Heimann v. City of Los Angeles, 30 Cal.2d 746, 759 (1947).

This is consistent with - indeed, mandated under the Supremacy Clause by - United States Supreme Court decisions:

> "It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and section 10 of the Lever Act directs payment. The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking."
> *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 43 S.Ct. 354, 356 (1923)

In applying these Constitutional requirements, considerations of fundamental fairness and equity require that the date of valuation be the date of deposit of probable just compensation, and not the date of

commencement of the action or issuance of the summons. To permit otherwise is to permit the condemnor to freeze the property value for more than eight years without making available to the Morrisons one penny of just compensation.

It is clear from the record that the Condemnor did not bring the case to trial within one year of the issuance of summons.

Likewise, it is clear from the record that the Condemnor did not bring the matter to retrial within one year after the issuance of the remittitur. (Remittitur entered April 18, 1977 [C.T. 241], first trial date set thereafter, July 26, 1978 [C.T. 391].

In California, a condemnor is not permitted to act as self-interested adversary in all respects. To the contrary, this Court has declared that the condemnor has a quasi-judicial role. As Mr. Justice Sullivan stated in *City of Los Angeles v. Decker,* 18 Cal.3d 860, 871 (1977):

> "The condemnor acts in a quasi-judicial capacity and should be encouraged to exercise his tremendous power fairly, equitably and with a deep understanding of the theory and practice of just compensation."
> 18 Cal.3d at 871.

A deep understanding of the theory and practice of just compensation would clearly indicate that a condemnee is not receiving just compensation, *i.e.,* being "put in as good position pecuniarily as he would have occupied if his property had not been taken," if he receives only in 1980, dollars of 1980 value for real property of which the value is based on 1973 values.

The Condemnor which now claims always to have been eager to go to trial could have ameliorated the situation dramatically anytime between 1973 and 1980 by making a deposit of probable just compensation.

The detailed state procedural rules have now caught up with the constitutional principles. Section 1263.140 of the Code of Civil Procedure provides:

> "Subject to Section 1263.110 [the deposit provision], if a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the

> commencement of the proceeding, the date of valuation is the date of commencement of such new trial unless, in the interest of justice, the court ordering the new trial orders a different date of valuation."

This section was part of the comprehensive revision of the eminent domain law, sometimes referred to as AB 11, and was operative July 1, 1976, over five years before the commencement of the retrial in this case. The Legislative Committee Comment to this section expressly notes the injustice of the case of *People v. Murata*, 55 Cal.2d 1 (1960), and indicates that the above section is intended to avoid this injustice. The Comment further notes, as mentioned above, that the condemnor can fix the valuation date at any time by making a deposit.

Thus, it is clear under the unique facts, circumstances, and timing of this case that the only fair and equitable -- and constitutionally permissible -- date of valuation is the date of deposit, May 9, 1980. C.T. 256.

Given the new statute, the rampant inflation in property values in the decade of the 70's, and the unique facts and timing of this case, *People v. Murata, supra,* cannot constitutionally be controlling. The Court of Appeal's reliance on it was misplaced, and to the extent it is asserted here, it should be overruled, disapproved or limited to its own facts.

* * * *

4 Civil 26710

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

COUNTY OF SAN DIEGO,

Plaintiff and Appellant,

vs.

L.E. MORRISON, et al.,

Defendants and Cross-Appellants.

CROSS-APPELLANTS' OPENING BRIEF

Defendants/cross-appellants, L.E. Morrison, et al. (hereinafter "Morrison"), respectfully submit the following brief in support of their cross-appeal from the judgment entered herein and from the order denying their motion for recovery of litigation expenses.

I

INTRODUCTION

By this cross-appeal (and resistance to the County's related appeal), Morrison seeks to obtain some small semblance of just compensation for the property interest taken from them involuntarily by the County more than 10 years ago.

Private property has long held a favored place in the jurisprudence of our nation. The words of the United States Supreme Court are inspiring and comforting:

> The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be out in as good position pecuniarily as he would have occupied if his property had not been taken.
>
> *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276 (1943).

The Morrisons long ago have found out that there is a dramatic difference between these glowing ideals and the practical realities of litigating with a tenacious and adversarial condemning agency. The passage of time, the vagaries of the judicial system, the delays of litigation, changes in the law, all compound the difficulty in applying general constitutional principles to real life situations to achieve equitable results.

In no way can the Morrisons hope to be "made whole" from the more than 10 years of tribulations relating to the taking of their real property and the destruction of the family business operated on the property. It is only sought through this cross-appeal to breathe some reality into the constitutional guarantees by interpreting statutory provisions and general rules in light of constitutional guarantees so as to reach a fair and just result in this -- the difficult and unusual case -- as well as in the simple and uncomplicated case.

The Morrisons seek correction of the following errors of the trial court in order to ameliorate their losses and have the opportunity to more nearly achieve "just" compensation after more than a decade of struggle:

- A declaration that the date of valuation is not February 16, 1973, the date of commencement of this action, but rather, May 9, 1980, the date the County finally first deposited probable just compensation for the taking of the Morrisons' real property;

- A declaration that the amount of any award, not offset by previous deposit or continued possession, bears interest from August 13, 1980, not at the rate of 7% per annum as presently provided for in the judgment, but at the prevailing market rate of interest;

- A declaration that it was error to deny the Morrisons' motion for recovery of litigation expenses, since by not prosecuting a cross-appeal of the original judgment, the Morrisons in practical effect made a standing offer to settle for the amount of the original judgment -- $837,000 -- which is less than the amount the jury ultimately awarded in the second trial of the action.

II

HISTORY

The uniqueness of this case flows in substantial part from its history. Thus, its factual and procedural history will be detailed:

- About 1962 -- The Morrisons begin operation of a sand extraction business on a large parcel of replenishing sand property in Bonita, California, adding over the years other parcels of property.

- February 16, 1973 -- County of San Diego filed a complaint in eminent domain to acquire the Morrisons' real property in fee. Clerk's Transcript 1 (hereinafter "C.T.").

- April 17, 1974 -- Trial of the eminent domain action commenced before the Honorable Gilbert Harelson. C.T. 224.

- November 15, 1974 -- Judgment was entered, awarding the Morrisons $837,000 for the real property interest taken. C.T. 228, 231-33.

- November 27, 1974 -- The County appealed from the judgment. C.T. 236.

- July 1, 1976 -- The operative date (for most cases) of the comprehensive revision of the California eminent domain law, CCP §§1230.010, *et seq*.

- February 14, 1977 -- This Court filed its opinion reversing the original judgment and remanding the case for a new trial. C.T. 242.

- April 18, 1977 -- Remittitur entered. C.T. 241.

- July 26, 1978 -- Date scheduled for retrial. C.T. 391:9-11.

- May 9, 1980 -- County makes deposit of probable just compensation in the amount of $519,000. C.T. 256.

- August 13, 1980 -- County takes possession of the Morrisons' real property, the Morrisons are dispossessed, and their business goodwill is lost. C.T. 256-60.

- October 5, 1981 -- Retrial commenced before a jury, Honorable James L. Focht, presiding. Reporter's Transcript 1 (hereinafter "R.T.").

- October 28, 1981 -- Jury returned a verdict for the value of the real property in the amount of $875,000 ($38,000 more than the previous judgment). R.T. 932.

- December 16, 1981 -- Judgment in condemnation entered. C.T. 406.

- February 11, 1982 -- County filed notice of appeal re goodwill award. C.T. 434.

- February 11, 1982 -- Morrisons' motion for recovery of litigation expenses denied. C.T. 449.

- March 5, 1982 -- Morrisons filed notice of cross-appeal. C.T. 444.

III

ISSUES PRESENTED ON CROSS-APPEAL

In order to effectuate just compensation to the Morrisons, the judgment must be reversed and the case remanded for retrial to correct the following prejudicial errors committed below:

1. The date of valuation must be May 9, 1980, the date of deposit of probable just compensation -- not February

16, 1973, a date more than seven years before the deposit of probable just compensation and more than eight years before the date of trial.

2. The amount awarded the Morrisons under the judgment and not offset by prior deposit or continuing possession, should bear interest at prevailing market rates from and after August 13, 1980 -- not 7% per annum as provided for in the existing judgment.

3. Since the County had a standing offer to settle the Morrisons' case for the original judgment ($837,000) and since the jury determined the fair market value of the real property to be even greater, to wit, $875,000, the Morrisons are entitled to recover their litigation expenses.

IV

RULES OF PROCEDURE IN EMINENT DOMAIN MUST BE FLEXIBLY APPLIED TO SATISFY CONSTITUTIONAL MANDATES.

A great deal of attention was given by the trial court to the detailed provisions of statute -- and presumably, these detailed, incomplete, overlapping, and sometimes confusing provisions will be urged by the County in this Court as well.

However helpful these detailed provisions of statute may be, it must be remembered that the ultimate test of eminent domain power lies in the Constitution.

The case of *United States v. Miller, supra*, summarizes the general provisions as widely accepted by the case law:

> The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken. 317 U.S. 369, 63 S.Ct. 276, 279-80.

The constitutional checks upon the exercise of the power of eminent domain are entrenched in California cases as well. The California Supreme Court had declared:

> The provision of the Constitution compelling the payment of just compensation for a public taking of property (Cal.Const., Art. I, §14) is self-executing. Since this is so it has consistently been held, in inverse condemnation cases, that inherent power is reposed in the trial court to provide for the assessment of just compensation in situations not within the purview of existing statutory provisions.
>
> *Citizens Utilities Co. v. Superior Court*, 59 Cal.2d 805, 812 (1963).

In the *Citizens Utilities Co.*, case, the California Supreme Court expressly approved the trial court's departure from the very statute involved here, CCP §1249, as follows:

> The trial court, in the instant case, was empowered to devise a procedure whereby the value of petitioner's water system could be *justly* and *constitutionally* assessed. This it did by providing that in the case of petitioner the condemned property should be assessed not as of the date of the summons, but as of the date of trial. This was a proper exercise of the inherent power of the trial court.
>
> 59 Cal.2d at 812 (emphasis added).

V

THE DATE OF VALUE MUST BE THE DATE OF DEPOSIT OF PROBABLE JUST COMPENSATION, NOT THE DATE OF FILING.

Considerations of fundamental fairness and equity require that the date of valuation be the date of deposit of probable just compensation, and not the date of commencement of the action or issuance of the summons. To permit otherwise is to permit the County to freeze the property value for more than eight years without making available to the Morrisons one penny in just compensation.

It is clear from the record that the County did not bring the case to trial within one year of the issuance of summons. C.T. 1, 224.

Likewise, it is clear from the record that the County did not bring the matter to retrial within one year after the issuance of the remittitur. (Remittitur entered April 18, 1977 [C.T. 241]; first trial date set thereafter, July 26, 1978 [C.T. 391:9-11].)

In California, a condemnor is not permitted to act as a self-interested adversary in all respects. To the contrary, our Supreme Court has declared that the condemnor has a quasi-judicial role. As Mr. Justice Sullivan stated in *City of Los Angeles v. Decker*, 18 Cal.3d 860, 871 (1977):

> The condemnor acts in a quasi-judicial capacity and should be encouraged to exercise his tremendous power fairly, equitably and with a deep understanding of the theory and practice of just compensation.
>
> 18 Cal.3d at 871.

A deep understanding of the theory and practice of just compensation would clear indiate that a condemnee is not receiving just compensation, *i.e.*, being "put in as good position pecuniarily as he would have occupied if his property had not been taken," if he receives only in 1980, dollars of 1980 value for real property of which the value is based on 1973 values.

The condemnor-County which now claims always to have been eager to go to trial could have ameliorated the situation dramatically anytime between 1973 and 1980 by making a deposit of probable just compensation.

The detailed procedural rules have now caught up with the constitutional principles. Section 1263.140 of the Code of Civil Procedure provides:

> Subject to Section 1263.110 [the deposit provision], if a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the commencement of the proceeding, the date of valuation is the date of commencement of such new trial unless, in the

> interest of justice, the court ordering the new trial orders a different date of valuation.

This section was part of the comprehensive revision of the eminent domain law, sometimes referred to as AB 11, and was operative July 1, 1976, over five years before the commencement of the retrial in this case. The Legislative Committee Comment to this section expressly notes the injustice of the case of *People v. Murata*, 55 Cal.2d 1 (1960), and indicates that the above section is intended to avoid this injustice. The Comment further notes, as mentioned above, that the condemnor can fix the valuation date at any time by making a deposit.

Thus, it is clear under the unique facts, circumstances, and timing of this case that the only fair and equitable -- and constitutionally permissible -- date of valuation is the date of deposit, May 9, 1980. C.T. 256.

FORMER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1249 REPEALED EFFECTIVE 1976, BUT APPLIED TO THIS CASE.

For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in Section 1248; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

No. __ -__

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

L.E. MORRISON and JEAN MORRISON,

Petitioners,

vs.

COUNTY OF SAN DIEGO,

Respondent.

PROOF OF SERVICE BY MAIL

GOEBEL & MONAGHAN
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Counsel for Petitioners

PROOF OF SERVICE BY MAIL

I, M.J. Harman, declare:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action. My business address is 401 West "A" Street, Suite 1815, San Diego, California 92101.

On September 19, 1984, I served the within PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA in re L.E. Morrison and Jean Morrison, Petitioners vs. County of San Diego, Respondent, in the United States Supreme Court, October Term, 1984, No. __-__, upon the parties to the action, by placing three copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California, addressed as follows:

Court of Appeal
Fourth Appellate District
Division One
1350 Front Street, Suite 6010
San Diego CA 92101

California Supreme Court
4250 State Building
350 McAllister Street
San Francisco CA 94102

Sandra J. Brower
Deputy County Counsel
355 County Administration Center
1600 Pacific Highway
San Diego CA 92101

Hon. James L. Focht
San Diego County Superior Court
P.O. Box 128
San Diego CA 92112

All parties required to be served have been served. I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed September 19, 1984, at San Diego, California

M.J. Harman

Office-Supreme Court, U.S.
FILED
OCT 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-454

IN THE

Supreme Court of the United States

October Term, 1984

L. E. MORRISON and JEAN MORRISON,

Petitioners,

vs.

COUNTY OF SAN DIEGO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Is a property owner entitled to a new date of value for his property on retrial when a condemnation judgment is reversed on appeal on grounds not involving the date of value?

2. Is a property owner entitled to a new date of value for his property on retrial when the property owner is the sole cause for several years of delay between trial and retrial in a condemnation action?

3. When the statutory language is "crystal clear" that the date of value established at a condemnation trial will remain the same for subsequent retrials, is a property owner able to circumvent clear statutory provisions by causing numerous continuances of a retrial which results in years of delay between trial and retrial?

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No. 84-454

IN THE

Supreme Court of the United States

October Term, 1984

L. E. MORRISON and JEAN MORRISON,

Petitioners,

vs.

COUNTY OF SAN DIEGO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

Respondent County of San Diego[1] respectfully opposes issuance of a writ of certiorari to review decisions of the California Supreme Court and California Court of Appeal, Fourth Appellate District, regarding a condemnation case that has already been litigated through every level of the California court system more than once in that over the past eleven years it has been tried twice and appealed twice, resulting in a final decision which is consistent with the United States and California Constitutions and statutory law.

[1] County of San Diego is hereinafter referred to as "County".

OPINIONS BELOW

In addition to the order of the California Supreme Court issued on June 21, 1984 denying a hearing in the California Supreme Court (Appendix A to the Petition); the opinion of the California Court of Appeal, Fourth Appellate District, filed March 29, 1984 (Appendix B to the Petition); the Court of Appeal "Order Modifying Opinion", filed April 17, 1984 (Appendix C to the Petition); and the Judgment in Condemnation of the San Diego Superior Court entered December 16, 1981 (Appendix D to the Petition), petitioners omit inclusion of the other earlier court opinions rendered in this matter prior to the second trial. These opinions include, in chronological order, the original San Diego Superior Court Judgment in Condemnation entered on November 15, 1974 (Appendix 1, *infra*) and the accompanying Finding of Fact and Conclusions of Law also entered on November 15, 1974 (Appendix 2, *infra*); the opinion of the California Court of Appeal, Fourth Appellate District, filed April 18, 1977, reversing judgment and remanding the matter for a second trial (Appendix 3, *infra*); the order of the California Court of Appeal, Fourth Appellate District, filed December 24, 1980, denying petitioners' petition for writ of mandate to stay petitioners' displacement from their property (Appendix 4, *infra*); the order of the California Court of Appeal, Fourth Appellate District, filed July 1, 1981, denying respondent's petition for writ of mandate and/or prohibition challenging the superior court order allowing petitioners to amend their answer to include compensation for loss of goodwill (Appendix 5, *infra*); and the order of the California Court of Appeal, Fourth Appellate District, filed August 10, 1981, denying without prejudice respondent's second petition for writ of mandate and/or prohibition on the same grounds as above (Appendix 6, *infra*). The above additions to the opinions referenced by petitioners constitute a more definite and complete disclosure of the lower courts' opinions and orders in this case as required by Rule 21(k)(ii) of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

L. E. Morrison and Jean Morrison[2] are petitioning this Court to review the final decision by the Court of Appeal for the State of California, Fourth Appellate District, Division One, which was filed in the above entitled case on March 19, 1984 and modified on April 17, 1984. Said decision affirmed in part, reversed in part, and remanded for further proceedings the San Diego County Superior Court eminent domain judgment entered on December 16, 1981. The award for the fair market value (and date of value) was affirmed, the denial of the Morrisons' motion for litigation expenses was affirmed, the award for loss of business goodwill was reversed, and the seven percent interest rate awarded on the condemnation award was reversed and remanded to the Superior Court for further proceedings to determine the applicable market rate of interest.

This case is unique in that it has a lengthy history, the length of which was caused by the Morrisons themselves, who persisted in continuing the retrial in this matter through *eight* consecutive requests for continuances, all of which were granted over the County's opposition.

This action was commenced on February 16, 1973 when the County filed its Complaint in Eminent Domain and the Summons was issued. The Morrisons answered said complaint on July 2, 1973. After depositing a security deposit with the Clerk of the Court, the County obtained an Order for Possession for a portion of the property on August 24, 1973, which took effect on September 13, 1973. On October 29, 1975 the Morrisons obtained a court order authorizing withdrawal of the security deposit held by the court.

The case was first tried in the Superior Court in 1974, the trial of which lasted approximately five months. Judgment was entered

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[2] L. E. Morrison and Jean Morrison are hereinafter referred to as "Morrisons".

on November 15, 1974, the court specifically finding the date of value to be February 16, 1973. Said judgment awarded the Morrisons $837,000.00 for the real property and $61,630.00 for the equipment and fixtures. The County appealed the 1974 decision on the grounds that it was error to admit evidence of net profits derived from a hypothetical business in determining fair market value of the real property. The court of appeal agreed with the County holding that said trial evidence was "clearly prejudicial" and reversed the superior court judgment. The 1973 date of value was not an issue at said 1974 trial or appeal thereof. The remittitur was entered on April 18, 1977.

The retrial of this matter was originally set for July 26, 1978; however, the Morrisons requested numerous continuances, all of which were granted, and changed counsel on three different occasions, all of which resulted in the retrial being delayed three and one-half years. This delay was solely caused by the Morrisons, as is detailed below.

On the first scheduled trial date, July 26, 1978, the Morrisons' first retained counsel, Donald McLean, requested a continuance of the trial date to complete an appraisal to allow the Morrisons an opportunity to propose a settlement. The trial was continued for this purpose; however, subsequent discussions with the Morrisons did not prove fruitful. At the continued trial date of February 22, 1979, the Morrisons again requested a continuance on the grounds that their appraisal was still not complete. The requested continuance was granted to May 9, 1979. At the trial date of May 9, 1979, the Morrisons requested another continuance to October 11, 1979, and represented to the court that they would be ready for trial and would request no more continuances. The continuance was granted.

Just prior to the scheduled trial date of October 11, 1979, the Morrisons discharged counsel Donald McLean and engaged Ronald Endeman as new counsel. Mr. Endeman then requested a fourth continuance of the trial claiming that no appraisal had yet

been done and the matter was continued to March 5, 1980. When the matter was called for trial on March 5, 1980, counsel for the County was engaged in another trial and the matter trailed until April 30, 1980, at which time the Morrisons requested a further continuance, stating that they were not yet ready for trial and that the appraisal had still not yet been completed. The County objected to any further continuances; however, the court granted a continuance to September 22, 1980 and suggested that the County take possession of the property. Mr. Endeman stated that the Morrisons would have no objection to the County taking possession and further represented to the court that he would be ready for trial at the new trial date, September 22, 1980, and would request no further continuances.

A Stipulation and Order Continuing Trial, signed by Mr. Endeman on behalf of the Morrisons and approved by the court, filed on May 20, 1980, reset the trial for September 22, 1980. Said stipulation recites that the continuance was requested by the Morrisons in order to prepare for trial; it was the fifth continuance requested by the Morrisons and the continuance of trial had no effect on the date of value in this proceeding "which is February 16, 1973". The County then deposited the necessary security funds with the court and obtained an Order for Possession on May 9, 1980 for the remainder of the Morrisons' property and took possession of the property on August 13, 1980, at which time the Morrisons' business was relocated to another site. The Morrisons withdrew the funds on deposit with the court on May 16, 1980.

Just prior to the September 22, 1980 trial date, the Morrisons again discharged their second counsel, Mr. Endeman, and engaged present counsel, Louis Goebel. On September 22, 1980, the Morrisons moved for another continuance of the trial and the County objected; however, the court continued the trial until January 19, 1981, on the grounds that there was a new counsel in the case and still no appraisal had yet been completed. On January 19, 1981, the court again continued the trial to March 26, 1981. The County was ready for trial and objected to the

continuance; however, on the scheduled trial date of January 19, 1981, there were no courts available and Louis Goebel, counsel for the Morrisons, had an out-of-town trial beginning January 26, 1981, and the earliest date the court could schedule a trial continuance was for March 26, 1981. On March 26, 1981, trial was again postponed until September 29, 1981. The County was ready for trial and objected to the continuance. The reason for the continuance was that Louis Goebel was engaged in trial through the month of May, and that the Court did not have any available trial dates after May until September 18, 1981. The presiding judge stated at that time that he would grant no more continuances and the case would be sent out to trial on September 29, 1981. Due to court congestion, the retrial in this matter eventually commenced on October 5, 1981. As a result of the above, the retrial of this matter was continued *eight* times, all at the Morrisons' request.

At the commencement of the retrial, on October 5, 1981, prior to selection of the jury, the Morrisons raised the issue regarding the applicable date of value before the trial judge. The Morrisons urged that the May 9, 1980 date of value be used rather than the previously established date of February 16, 1973. The Morrisons did not raise any federal constitutional issue before the trial judge on this matter but, instead, relied upon the substance of a recently enacted state statute which, however, expressly stated, "This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976. . . ." The present eminent domain case was commenced on February 16, 1973 and the trial judge held that "this statutory language is crystal clear," and upheld the February 16, 1973 date of value.

A stipulation setting the value of fixtures and equipment at the sum of $69,505.00 had been previously filed on May 19, 1981, and the jury awarded $875,000.00 as the fair market value of the real property and $56,250.00 as compensable loss of goodwill. The Judgment in Condemnation setting forth the above award together with seven percent interest was entered on December 16, 1981. No objections to the judgment were filed by the Morrisons.

The County filed a notice of appeal as to the loss of goodwill award on February 11, 1982, and the Morrisons filed a notice of cross-appeal on March 5, 1982 as to the judgment in condemnation and the court's order denying recovery of litigation expenses.

The court of appeal favored the County's appeal and reversed the trial court judgment, striking the loss of goodwill award. The court of appeal disfavored the Morrisons' cross-appeal in affirming the trial court's date of value of 1973 and affirming the denial of the Morrisons' motion for litigation expenses; however, the court of appeal did reverse the seven percent prejudgment interest award and remanded the matter back to the trial court to determine the market rate of interest. The Morrisons' Petition for Hearing filed with the California Supreme Court was denied on June 21, 1984. On September 19, 1984 the Morrisons filed the subject Petition for Writ of Certiorari.

ARGUMENT

I.

PETITIONERS' RELIANCE ON *KIRBY FOREST INDUSTRIES v. UNITED STATES* IS MISPLACED

The Morrisons place heavy reliance upon this Court's decision in *Kirby Forest Industries v. United States* (1984) ____ U.S. ____ [81 L.Ed.2d 1] to support their position that they were not awarded "just compensation" when the 1973 date of value established at trial was used for the retrial of the appeal, particularly when several years elapsed between trial and retrial, even though all such delay was solely caused by the Morrisons themselves. However, the *Kirby Forest Industries* case is not applicable in that it is distinguishable from the present case.

Although all eminent domain actions must comply with the provisions of the Fifth Amendment to the United States Constitution

(made applicable to California by the Fourteenth Amendment to the California Constitution) in providing property owners "just compensation" for their land, the federal statutory condemnation scheme is quite different from that of the State of California. As described by this Court in the beginning of its *Kirby Forest Industries* opinion, there are three statutory methods of condemnation available to the United States, whereas there is only one statutory method available to the State of California. Although the federal condemnation procedures and the California statutory procedure all provide "just compensation" to the property owner, each procedure has its own statutory provisions. The so-called "straight-condemnation" procedure, involved in the *Kirby Forest Industries* case, allows the United States to wait until a condemnation award is entered and then the government has the option to purchase the property at the adjudicated price or dismiss the condemnation action. This procedure is quite different from the County's condemnation action in the present case where the County had no option but to pay the adjudicated award no matter what it was, particularly since the County had already displaced the Morrisons and relocated them to a new site.

This Court emphasized the impact of this straight-condemnation procedure on its decision in stating as follows:

> "The Government contends that, in straight-condemnation proceedings like that at issue here, the date of taking must be deemed the date the United States tenders payment to the owner of the land. The Government's position is amply supported by prior decisions by this Court and by indications of Congressional intent derivable from the *structure of the pertinent statutory scheme and the governing procedural rule*." (*Kirby Forest Industries, supra*, ____ U.S. ____ [81 L.Ed.2d 1 at 11], emphasis added.)

This Court goes on further to quote *Danforth v. United States* (1939) 308 U.S. 271 at 284 as follows:

> "[*U*]*nless a taking has occurred previously in actuality or by a statutory provisions* . . . we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor." (Emphasis added.)

As stated above, this Court does show deference to statutory provisions implementing condemnation procedures and, in particular, in establishing a date of taking or value. As will be discussed more fully below, the California statutory scheme expressly established a date of taking in the present action as February 16, 1973.

II.

CALIFORNIA STATUTORY LAW ESTABLISHES THE DATE OF TAKING IN THIS CASE AS FEBRUARY 16, 1973

The date of value in this eminent domain action is February 16, 1973, the date the summons was issued as provided for in former Section 1249 of the California Code of Civil Procedure which was in effect at the time this proceeding was commenced. The superior court, in the original 1974 trial of this matter, specifically found the date of value to be February 16, 1973. This same date of February 16, 1973 was also stipulated to as the date of value for purposes of retrial by the Morrisons and approved by the court. Accordingly, the court below in the 1981 retrial of this matter ruled the date of value to be February 16, 1973 and said date of value was affirmed by the court of appeal. In spite of the prior courts' rulings, the stipulation referred to above, and the

controlling statute, the Morrisons now petition this Court for review of this issue.

The Morrisons argued that the date of value in this matter should have been May 9, 1980, the date the County made a deposit of probable compensation with the court. The Morrisons are apparently ignoring the fact that the County made an earlier deposit of probable compensation in 1973.

In support of a May 9, 1980 date of value, the Morrisons relied on section 1263.110 of the California Code of Civil Procedure, which states in pertinent part as follows:

> "(a) *Unless an earlier date of valuation is applicable under this article*, if the plaintiff deposits the probable compensation in accordance with Article 1 (commencing with Section 1255.010) of Chapter 6 or the amount of the award in accordance with Article 2 (commencing with Section 1268.110) of Chapter 11, the date of valuation is the date on which the deposit is made." (Emphasis added.)

It is important to note that said section begins by stating an exception to this provision, that being if an earlier date of valuation is applicable under this article, then section 1263.110 will not apply. An earlier date of valuation is applicable because the above article did not become operative until July 1, 1976.

The above cited article, referred to as the new Eminent Domain Law, was enacted by the California Legislature in 1975 (Stats. 1975, ch. 1275) and is found in California Code of Civil Procedure Section 1230.010 and following. By the clear terms of the statute, it became operative July 1, 1976, and does not apply to eminent domain proceedings commenced prior to January 1, 1976.

Section 1230.065 of the California Code of Civil Procedure clearly defines the actions to which the new Eminent Domain Law

applies and the actions to which it does not apply. Section 1230.065 is set out below in its entirety:

> "(a) This title becomes operative July 1, 1976.
>
> "(b) *This title does not apply to an eminent domain proceeding commenced prior to January 1, 1976.* Subject to subdivisions (c) and (d), in the case of an eminent domain proceeding which is commenced on or after January 1, 1976, but prior to the operative date, this title upon the operative date applies to the proceeding to the fullest extent practicable with respect to issues to be tried or retried.
>
> * * *
>
> "(d) If, on the operative date, an appeal, motion to modify or vacate the verdict or judgment, or motion for new trial is pending, the law applicable thereto prior to the operative date governs the determination of the appeal or motion." (Emphasis added.)

This action was commenced on February 16, 1973 (Cal. Code Civ. Proc., § 1250.110), almost three years prior to the effective date of the new Eminent Domain Law. Pursuant to subsection (b) of section 1230.065 above, none of the provisions of the new Eminent Domain Law apply to this case.

The applicable law to this case is found in the provisions of the California Code of Civil Procedure in effect when the complaint was filed, former Code of Civil Procedure Section 1237 and following. Pursuant to former Code of Civil Procedure Section 1249, the date of value in the present case is the date of issuance of summons. Former section 1249 provides:

> "For purposes of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of issuance of summons."

Specifically on point with this issue, the California Supreme Court has held that in interpreting California Code of Civil Procedure Section 1249, the date of issuance of summons remains the valuation date in the event of a retrial. (*People v. Murata* (1960) 55 Cal.2d 1.)

The court in *People v. Murata, supra*, 55 Cal.2d 1, at page 10, held:

> "[T]he correct interpretation of [Section 1249] is that the date for fixing valuation and damages is determined at the time of the first trial and in the event of subsequent retrial or trials, *once having become fixed, it remains the same*." (Emphasis added.)

(See also *Santa Maria v. Alco-Pacific Enterprises, Inc.* (1968) 266 Cal.App.2d 477; *People v. Shasta Pipe & Supply Co.* (1968) 264 Cal.App.2d 520; *People v. Mascotti* (1962) 206 Cal.App.2d 722.) The date of value in this matter was determined at the time of the first trial as February 16, 1973, and therefore, "having become fixed", remains the same in the subsequent retrial.

It is of further importance that the parties entered into a stipulation, approved by the superior court on May 20, 1980, that the date of value in the retrial of this proceeding was to be February 16, 1973. The law is quite clear that when parties have stipulated to a particular date of value, that date controls. The use of a stipulation is an expeditious way of resolving valuation date problems. (*State of California v. Clark* (1973) 33 Cal.App.3d 463, 468; *People v. Murata, supra*, 55 Cal.2d 1, 4-5.) Furthermore, the May 20, 1980 stipulation was executed after the effective date of the new Eminent Domain Law and it therefore evidences a clear

agreement as to the February 16, 1973 date of value; and agreement that the Morrisons now seek to breach.

The Morrisons made passing reference to the fact that the originally scheduled retrial in this matter was more than one year after the remittitur was filed; however, California Code of Civil Procedure Section 583(c) allows three years for an action to be brought to retrial after being reversed and remanded:

> ". . . When an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from and order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which the remittitur is filed by the clerk of the trial court. . . ."

The retrial in this matter clearly meets the above statutory limitation, in that the original retrial date was set for 15 months after the remittitur was filed.

It was interesting to find the Morrisons making such an argument as the one above in light of the fact that they are responsible for the retrial in this matter being delayed for three and one-half years through their numerous requests for continuance. Because of the delays incurred between the remittitur and the retrial, the Morrisons now claim they are prejudiced by the previously fixed and agreed-upon date of value. The Morrisons, of course, have the right to reasonable continuances, and even the right to fire their attorneys, one, two or three times, thereby requiring still additional time for new counsel to prepare; however, the Morrisons should not be able to use the delays they alone caused to support an argument for an increased award due to passage of time. Although the County continually and vigorously objected to the

seemingly never-ending continuances requested by the Morrisons, through various tactics, including discharge of several counsel on the eve of trial, the Morrisons succeeded in obtaining continuances of the retrial on eight different occasions. Surely, it would be unjust enrichment to the Morrisons to allow them to reap unconscionable benefits from their procrastinations and dilitory tactics by allowing a date of value subsequent to the original date of February 16, 1973.

The Morrisons cite the case of *Citizen's Utility Co. v. Superior Court* (1963) 59 Cal.2d 805, in an attempt to encourage the Court to depart from establishing statutory and case law in this area. However, this case is easily distinguishable in that the Court in the *Citizen's Utility Co.* case did not circumvent existing law, but instead, created law where none previously existed:

> "*Inasmuch as the Legislature has failed to provide a procedure to cover the contingency involved*, pursuant to its inherent powers the court had the power to devise a proper procedure." (*Citizen's Utility Co. v. Superior Court, supra*, 59 Cal.2d at 812, emphasis added.)

In the present case, there exists no contingency for which the Legislature has failed to provide, and as a result the prevailing legal precedent mandates the date of value to be February 16, 1973.

Superior Court Judge Focht, whose ruling the Morrisons challenge, was completely unpersuaded by the Morrisons' argument for a May 9, 1980 date of value:

> "*On the other hand, it just appears to me that this statutory language is crystal clear*. The Legislature can, of course, make statutes retroactive and sometimes when there is no reference one way or the other as to whether it will be retroactive, it is a

matter of judicial interpretation whether or not it is retroactive.

"The subsection before 1230.065 very clearly states that the law does not apply to an eminent domain proceeding commenced prior to January 1, 1976, which brings us right back to a Murata situation."

Any inequities which might exist were brought about by the Morrisons' own insistent dilatory behavior in obstructing a timely retrial in this matter. Therefore, the law must prevail and the date of value of February 16, 1973 must be affirmed.

CONCLUSION

The California courts' decisions in this matter are not inconsistent with the Fifth Amendment to the United States Constitution nor this Court's decision in *Kirby Forest Industries v. United States, supra*, ____ U.S. ____ [81 L.Ed.2d 1]. This matter was originally tried in 1974 and a 1973 date of taking was established. On appeal, judgment was reversed on the ground that an improper valuation method was relied upon by the jury. This reversal did not affect the date of taking, and a retrial was immediately scheduled. The Morrisons, however, requested one continuance of the retrial after another, all over the County's objections, until *eight* continuances had been granted and several years had elapsed between the trial and retrial. As a result of the delay, caused by the Morrisons alone, the Morrisons now claim they were not awarded just compensation because of the original 1974 date of taking. Had the Morrisons not requested and been granted their numerous continuances for the retrial, this issue would not be before this Court today.

This Court has held in both *Kirby Forest Industries v. United States, supra*, ____ U.S. ____ [81 L.Ed.2d 1] and *Danforth v.*

United States (1939) 308 U.S. 271 that statutory provisions will prevail in determining a date of taking. In the present case, the California statutory provisions are "crystal clear" that once a date of taking is established, it will remain the same in a subsequent retrial or retrials. For all of the foregoing reasons, respondent County of San Diego respectfully requests that the Petition for Writ of Certiorari be denied.

DATED: OCTOBER 18, 1984

Respectfully requested,

LLOYD M. HARMON, JR., County Counsel
HOWARD P. BRODY, Chief Deputy

By: SANDRA J. BROWER, Deputy

Attorneys for Respondent

APPENDICES

APPENDIX 1

FILED
JESSE OSUNA, CLERK
NOV 15 1974
BY
231

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236-1551
By HAROLD E. LANDIS and JOE N. TURNER
Attorneys for Plaintiff and Cross-Defendant

ENTERED
NOV 15 1974
976 339
Judgment Book ___ Pg ___

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO, Plaintiff, v. L. E. MORRISON, et al., Defendants.	NO. 339813
L. E. MORRISON and JEAN MORRISON, Cross-Complainants, v. COUNTY OF SAN DIEGO, DOES I through XX, Cross-Defendants.	**JUDGMENT IN CONDEMNATION**

Upon the Findings of Fact and Conclusions of Law on file herein and good cause appearing therefor, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Upon payment into Court for the benefit of the defendants of the total sum of $898,638, the property described in plaintiff's Complaint as Parcel No. 71-0083 A, B, C, D and E, together with all improvements thereon pertaining to the realty and the fixtures and equipment set forth in the Findings of Fact and Conclusions of Law shall be condemned for the purposes set forth in the Complaint.

2. The payment into Court of the sum of money specified above is in full payment for the interests in the land so taken, together with all the improvements thereon pertaining to the realty, the fixtures and equipment set forth in the Findings of Fact and Conclusions of Law, and for all damages of every kind and nature suffered by the defendant by reason of the taking of the property.

3. From said total sum of $898,638, the following shall be disbursed to the County Tax Collector of San Diego County, pursuant to Section 4986, et seq. of the California Revenue & Taxation Code:

(1) Zero dollars, the total due as of the day before trial, April 16, 1974;

(2) Zero dollars per day from April 17, 1974 (the date of trial) through June 30, 1974;

(3) $17.72 per day from July 1, 1974 to and including the day before the date the Final Order of Condemnation in this proceeding shall be recorded.

4. All taxes, penalties and costs which are a lien on said Parcel and which are apportioned to that portion of the fiscal year from the date that the Final Order of Condemnation is recorded in the

Office of the County Recorder of San Diego County are hereby cancelled pursuant to Section 4986 of the Revenue & Taxation Code.

5. Defendants shall recover costs of suit incurred herein in the sum of $_____.

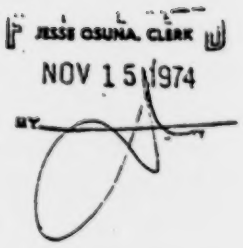
6. The cross-complaint filed by the defendants is dismissed with prejudice subject to the plaintiff's acquisition of the defendants' property by Final Order of Condemnation.

Dated: November 15, 1974

JUDGE OF THE SUPERIOR COURT

GILBERT HARELSON

APPENDIX 2



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By HAROLD E. LANDIS and JOE N. TURNER
Attorneys for Plaintiff and Cross-Defendant

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

COUNTY OF SAN DIEGO, Plaintiff, v. L. E. MORRISON, et al., Defendants.	NO. 339813
L. E. MORRISON and JEAN MORRISON, Cross-Complainants, v. COUNTY OF SAN DIEGO, DOES I through XX, Cross-Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This action in eminent domain to condemn certain property of the defendant, hereinafter described, for public park purposes, came on for trial on April 17, 1974. The plaintiff is the County of San Diego, a political subdivision of the State of California. The defendants, L. E. and Jean Morrison, are the owners of the real property sought to be condemned by the plaintiff County of San Diego.

The plaintiff County of San Diego appeared by and through Robert G. Berrey, County Counsel, William George, Deputy County Counsel, and Harold E. Landis, Joe N. Turner, J. Tim Konold, and Higgs, Fletcher & Mack.

The defendants, L. E. Morrison, Jean Morrison, Bank of America National Trust & Savings Association, Hattie I. Brewer, a widow, beneficiary under Deed of Trust recorded March 7, 1968 as Document No. 38734 of Official Records and Vesta Gent, a married woman, beneficiary under deeds of trust recorded January 29, 1969 as Document No. 16727 and February 3, 1970 as Document No. 19358, Official Records, County of San Diego, appeared by and through Donald F. McLean, Jr., C. Michael Cowett, and Jennings, Engstrand & Henrikson, a Professional Law Corporation. All of the parties hereto having waived their right to a trial by jury, the case was tried before Hon. Gilbert Harelson, Judge of the Superior Court, sitting without jury.

The trial commenced on April 17, 1974 and concluded on September 10, 1974, and the matter was submitted to the Court for decision. Prior to, during, and following the trial of the action, various legal memoranda were submitted by both parties and considered by the Court.

The parties presented evidence through witnesses, the submission of documents and exhibits, and a view of the condemned property.

Upon consideration of the pleadings on file herein, the evidence, both oral and documentary, submitted herein, the Court's view of the condemned property, the legal memoranda submitted by the parties, the oral argument presented by the parties, and good cause appearing therefor, the Court hereby makes and files the following:

FINDINGS OF FACT

1.

This proceeding in eminent domain was regularly commenced in San Diego County, California, on March 12, 1973 by the filing of a complaint in eminent domain by the plaintiff, the County of San Diego, a political subdivision of the State of California.

2.

The defendants, L. E. and Jean Morrison, are the owners of the property being condemned in this proceeding, as the same is more fully described in the complaint on file herein.

3.

All of the defendants mentioned in the preceding recitals have interests in the property which is the subject of this proceeding and which property is described in the complaint on file herein and is denominated therein as Parcel No. 71-0083 A, B, C, D and E.

4.

Said Parcel No. 71-0083 A, B, C, D and E is an entire parcel and there is no remainder parcel.

5.

The Superior Court of the State of California in and for the County of San Diego is a proper Court for the trial of this proceeding, and the Court has jurisdiction of the parties and of the subject matter of this action.

6.

The property owned by the defendants is being condemned for public park purposes.

7.

The plaintiff, County of San Diego, has the power to condemn all of the defendants' property.

8.

The use and purpose for which the plaintiff County of San Diego is condemning the defendants' property, to wit: a public park, is a public use and is a use authorized by law. The taking of the defendants' property, as described in the complaint, is necessary for said public use. The location of the proposed public improvement and project, which is the object of the action, is planned and located in a manner which will be most compatible with the greatest public good and the least private injury.

9.

The date upon which just compensation is to be ascertained is February 16, 1973.

10.

The plaintiff is condemning fixtures and equipment compensable in an action in eminent domain as follows:

Plant, sand and gravel processing
Blender
Pumping system
Scale, motor truck
Steel hopper
Centrifugal pump
Portable rock crusher
Steel tank (gasoline)
Steel tank (Diesel oil)
Steel shed
Floating dredge, clam shell
Engine/power plant, gasoline engine
Rubber belts, misc., used; sand plant spare parts
Trailer, 2-wheel office

11.

As of the valuation date for the subject parcel, the defendants possessed a right to extract sand from a six-acre site on the property and further possessed a permit from the County of San Diego to process sand extracted therefrom.

12.

As of the date of valuation, there was not a permit to extract sand from any other area of the subject property, nor was there a permit to process sand taken from any other area of the property. As of the valuation date, there was no application pending for a permit to extract or process sand for an expanded area within the subject property.

13.

The highest and best use of the property is interim sand extraction followed by private recreational use.

14.

There is a reasonable probability that a use permit will be issued by the County of San Diego for the expansion of the area of the existing sand extraction program for a ten-year period.

15.

There is a reasonable probability that a use permit will be issued by the County of San Diego for a private recreation park at the end of the said ten-year period.

16.

The market value of the land is the proper measure of just compensation in this case.

17.

The market value of land containing sand must include, as a factor, the value of the sand in place.

18.

The value of sand in place is fixed by capitalizing the net income from its extraction and sale.

19.

The testimony of Keith W. Brownell as to the residual land value after the extraction of the sand is unconvincing.

20.

The defendant has not met his burden of proof as to the residual land value of $210,000, or any value thereof.

21.

The fair market value of the real property sought to be condemned is $837,000.

22.

The fair market value of the fixtures and equipment enumerated in Finding No. 10, supra, is $69,505.

23.

Pursuant to stipulation of the parties it has been agreed that the following items are to be withdrawn by defendants prior to possession by plaintiff at the indicated values:

Scale, motor truck	$2,995.00
Centrifugal pump	120.00
Portable rock crusher	3,000.00
Steel tank (gasoline)	135.00
Steel tank (Diesel oil)	400.00
Trailer, 2-wheel office	800.00
Steel shed	425.00

Thus, the total of the above-withdrawn items is $7,875, and the just compensation for fixtures and equipment actually taken by plaintiff is $61,630.

24.

The total just compensation to be paid to defendants is the market value of the real property, $837,000, plus the net amount due for equipment and fixtures, $61,630, for a total of $898,630.

25.

Defendants and cross-complainants, L. E. Morrison and Jean Morrison, filed a cross-complaint in this action on July 2, 1973.

26.

There was no evidence presented upon the issues raised in the cross-complaint.

CONCLUSIONS OF LAW

1.

The plaintiff herein has the power to condemn the property of the defendants.

2.

Pursuant to Section 4986, et seq. of the California Revenue and Taxation Code, the Court will order that taxes and penalties due and owing the County of San Diego shall be paid from the award.

3.

Upon the payment of damages awarded in the Final Judgment of Condemnation, the plaintiff will be entitled to a Final Order of Condemnation.

4.

The defendants are entitled to their costs of suit herein.

5.

The total just compensation is $898,630.

6.

The income approach utilized by Dr. Edward J. Neuner in fixing the value of sand in place was proper and not precluded by Evidence Code Section 819.

7.

The defendants are not entitled to any damages by reason of the cross-complaint herein, and the cross-complaint shall be dismissed subject to the plaintiff's acquisition of the defendants' property by a Final Order of Condemnation.

Dated: November 15, 1974

JUDGE OF THE SUPERIOR COURT

GILBERT HARELSON

APPENDIX 3

FILED
FEB 14 1977
CLERK
COUNTY CLERK

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
Robert D. Zumwalt, Clerk
APR 18 1977
BY

COUNTY OF SAN DIEGO,	
Plaintiff and Appellant,	
v.	
L. E. MORRISON, et al.,	4 Civ. No. 15563
Defendants and Respondents.	(Sup. Ct. No. 339813)

APPEAL from a judgment of the Superior Court of San Diego County. Gilbert Harelson, Judge. Reversed.

The County of San Diego sued L. E. Morrison and Jean Morrison in eminent domain to acquire 69.17 acres of river-bottom land located within the flood plain of Sweetwater River. A special use permit had been issued to allow the processing and removal of sand and gravel from approximately six acres of the property. The permit had been issued a number of years before the establishment of a zoning ordinance controlling such activities and the Morrisons were actively engaged in the commercial extraction of sand at the time of trial.

On February 16, 1973, the agreed date of evaluation, the County filed a complaint in eminent domain to acquire the property for park and recreation facilities. After trial by court it was found the highest and best use of the property was for extracting sand for a period of ten years, followed by recreational use, and it was found to be reasonably probable the County would issue a permit for such use. The fair market value of the property was fixed at $837,000 and the value of fixtures set at $61,630, for a total of $898,630. The County appeals.

The County contends it was error to admit evidence of net profits derived from a hypothetical business (sand extraction plant) in determining the fair market value of the real property. It is alleged error resulted from the testimony of Dr. Edward J. Neuner, the defense expert, who sought to place a market value on the minerals located on the property based on the income generated by a hypothetical business.[1]

Dr. Neuner, whose qualifications as an expert in economics are not in contention, studied the land and its potential uses and reviewed the feasibility study of the sand production capabilities of the property prepared by properly qualified geotechnical and civil engineers and determined the highest and best use was as a source of sand and minerals. He stated he had undertaken a study of production, marketing and pricing of construction quality sand in San Diego County and based his conclusions on this work. He theorized the property could be expected to yield 298,600 tons of sand annually for ten years. He testified he viewed the land and minerals as inseparable items of value but found the real value in the sand available for extraction and made no effort to fix a value on the surface area after removal of the minerals. In assessing the value of the material in place he drew the following conclusions:

FOOTNOTE 1: It is not suggested the business conducted by Morrison on the six acres provides the basis for projecting production, sales or expenses of the conduct of business on the acreage subject of this proceeding, so we are not presented the issue of income of an existing business.

1. **Production.** The property could reasonably be expected to produce approximately 300,000 tons a year for ten years, and a special use permit from the County could be obtained.

2. **Income.** The prudent price for sand from the Morrison property would vary from $1.80 to $2.80 per ton depending on its quality and would have a weighted average price of $2.40 per ton of material commercially marketed. He determined the production from this pit would have no significant impact on the price structure of sand in San Diego County which uses more than 4-1/4 million tons annually and it could be assumed all the sand could be marketed. On this basis the property would produce an annual sales revenue of $716,640.

3. **Expense.** The direct production costs of extracting, processing and marketing the material would approximate $1.10 per ton extracted ($1.10 times 312,400 tons for a total of $343,640 annual operating costs); $50,000 would be a reasonable allowance for administrative overhead and cost of managing the extraction; property taxes would run $17,774 annually.

4. **Capital investment.** $585,000 was a prudent estimate of the capital expenditures required for a sand producing capacity of 300,000 tons per year. An allowance should be made for a 17 percent capitalization rate of return for the investment in a business with characteristics and risks as here involved.

After determining the value of the minerals the property might reasonably be expected to produce each year, he deducted the cost of extraction including administrative costs, discounted the income at 17 percent for the ten-year period and subtracted the cost of the capital investment to arrive at the present value of the minerals, namely, $836,926.

The trial court obviously placed great reliance on this method of valuing the property as evidenced by Finding of Fact No. 18.[2] The finding the property has a fair market value of $837,000 corresponds to the testimony of Neuner, rounding off his figure to the closest $100. The finding the residual value of land, subject of the testimony of defendants only other expert, was unconvincing (Finding No. 19),[3] and the great disparity of the award with evidence offered by the plaintiff's experts, reveals the court's complete acceptance on Neuner's testimony.

No issue exists between the parties as to the value of fixtures and equipment set by the court.

The United States Constitution (Fifth Amendment), as well as the State Constitution (art. 1, §14), requires "just compensation for property taken in the exercise of the power of eminent domain." Fair market value is accepted as "just compensation" (*United States v. Commodities Trading Corporation*, 339 U.S. 121 [70 S.Ct. 547]; *People ex rel. Dept. of Public Works v. City of Fresno*, 210 Cal. App. 2d 500, 515-516). The definition of fair market value has been a matter more for the courts than the Legislature (*County of Los Angeles v. Ortiz*, 6 Cal. 3d 141, 145), but the Evidence Code does codify the standards and methods of determining just compensation (Evid. Code §810 et seq.).[4] The Code provides, however, those standards are not intended to alter or change existing substantive law (Evid. Code §812).

FOOTNOTE 2: "18. The value of sand in place is fixed by capitalizing the net income from its extraction and sale."

FOOTNOTE 3: "19. The testimony of Keith W. Brownell as to the residual land value after the extraction of the sand is unconvincing."

FOOTNOTE 4: Of particular relevance here is Evidence Code section 819, which provides: "When relevant to the determination of the value of property, *a witness may take into account* as a basis for his opinion *the capitalized value of the reasonable net rental value* attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon)." (Emphasis added.)

The California courts have determined fair market value should be the highest price estimated that the property would bring if it were exposed for sale in the open market for a reasonable period of time, and if the buyer had knowledge of all uses and purposes to which it is adaptable (*Sacramento etc. R.R. Co. v. Heilbron*, 156 Cal. 408, 409). This, of course, justifies the introduction of evidence relative to the availability of this property for various uses. Evidence of the economic feasibility of underwater mining, for example, to show the use to which the property may be put is properly admissible (*People ex rel. Dept. Pub. Wks. v. Flintkote Co.*, 264 Cal. App. 2d 97, 102). The evidence of highest and best use, however, must be distinguished from value from a particular use.[5] In *Sacramento etc. R.R. Co. v. Heilbron, supra*, 156 Cal. 408, 412, the court said:

> "[T]he test [of market value] is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that therefore while evidence that it is 'valuable' for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value. For such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land. . . ."

FOOTNOTE 5: The case of *State of Cal. ex rel. State Pub. Wks. Bd. v. Wherity*, 275 Cal. App. 2d 241, relied on by Morrison, draws attention to this distinction (at p. 250), justifying the testimony of the "economist" on "***highest and best use when separated from a consideration of the market value of the property itself.***" (Emphasis added.)

This rule has been followed consistently since that time (*City of Los Angeles v. Retlaw Enterprises, Inc.*, 16 Cal. 3d 473, 488-489; *Long Beach City H. S. Dist. v. Stewart*, 30 Cal. 2d 763, 771; *Oakland v. Pacific Coast Lumber etc. Co.*, 171 Cal. 392, 399-400; *Laguna Salada etc. Dist. v. Pac. Dev. Co.*, 119 Cal. App. 2d 470, 476; *East Bay Mun. Utility Dist. v. Kieffer*, 99 Cal. App. 240, 250-251 (overruled on another point in *County of San Diego v. Miller*, 13 Cal. 3d 684, 693); *City of Stockton v. Vote*, 76 Cal. App. 369, 402-403).

In *People ex rel. State Park Com. v. Johnson*, 203 Cal. App. 2d 712, defendant's witness, an architect and planning consultant, did a feasibility study of the property with schematic diagrams for the sole purpose of showing that the land could be physically and economically adapted to his envisioned project which was a resort hotel with swimming pool, restaurant and lounge bar. The court first sustained objections to giving any future income figures because of the speculation involved but then asked the witness over plaintiff's objection what a purchaser would pay for property consistent with his plan. The witness then testified as to the figure he felt a buyer would expect to pay and still make "economic ends meet." The reviewing court held while testimony regarding the adaptability of land for that purpose was proper, it was error to admit evidence concerning the specific dollar value of the land for a specific project.

The same result was reached in *People ex rel. Dept. Pub. Wks. v. Silveira*, 236 Cal. App. 2d 604, 627, where the court held it was proper for a jury to consider evidence of economic analysis of adaptability of the property to a commercial and residential development to determine its highest and best use, but held it would be error to admit evidence to support a market value in terms of money which the land would bring for a specific purpose or as a result of a projected specific plan of development.

This rule proscribing evidence of the value of special uses in determining market value has been specifically applied in federal cases involving minerals (*United States v. 13.40 Acres of Land in*

City of Richmond, 56 F.Supp. 535, 538, 539). In *County of Los Angeles v. Beverley*, 126 Cal. App. 2d 89, 93, testimony of possible oil deposits having a speculative value of $5,500 was found to be improperly admitted but the case is undoubtedly distinguishable in that the testimony did not actually establish the presence of minerals but assigned the value for the "possibility" of oil being found. The court did, however, restate the general rule we have stated citing *Sacramento etc. R.R. Co. v. Heilbron, supra*, 156 Cal. 408.

The rule has been recognized and repeated by leading text writers (4 Nichols on Eminent Domain (3d ed.), §13.22[2], p. 133; I Orgel, Valuation Under Eminent Domain (2d ed.), §165, pp. 673-674 [relying in part on *City of Los Angeles v. Deacon*, 119 Cal. app. 491, 494-497]; Palmer's Manual of Condemnation Law, §86, at p. 242; and is the subject of 156 A.L.R. 1416, at p. 1423 et seq.; 27 Am. Jur. 2d, §290, at p. 91 et seq.; and 29A C.J.S., §174, at p. 735 et seq.). We are unable to find authority suggesting a departure from the long line of cases in this area.

While Neuner said the value of the land was inseparable from the minerals located in it, he placed a value on the land based only on the economic analysis of the market value of extracted sand. His value was, strictly speaking, a simple computation of number of tons of material available multiplied by the average price per ton for material of that general quality and subtracting the cost of the extraction which a hypothetical business operating on the premises might expect to incur. Such a business presents highly speculative cost and market determinations. It follows Neuner used an improper method to ascertain projected income and thus to establish a fair market value on the land. Accounting procedures of the business, flood control programs around the pits, fluctuations in property tax rates or tax assessed value, long-range projection of market demand for the product, inflation of production costs, government's attitude toward growth and its effect on construction programs, etc., present factors not possible to estimate or build into the analysis. Such calculations based on

such speculative factors are uniformly rejected by courts and must be rejected here.

Neuner's testimony is properly admissible to attest the highest and best use but it was error to allow admission of dollar value of sales in the course of the hypothetical business to establish fair market value. Morrison's only other expert, a real estate appraiser, admitted reliance on Neuner's analysis in determining the interim value of the property and the court's reliance on Neuner's testimony is apparent from the findings of fact. This testimony of value was clearly prejudicial.

Judgment reversed.

Acting P.J.

WE CONCUR:

J.

J.*

I IRVIN I. TUSZYNSKI, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that the preceding and annexed is a true and correct copy of Opinion as shown by the records of my office.

WITNESS my hand and the Seal of the Court this 14th day of February A.D. 19 77

IRVIN I. TUSZYNSKI, Clerk

By _____ Deputy Clerk

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

BEST AVAILABLE COPY

APPENDIX 4

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

COURT OF APPEAL - FOURTH DIST.
FILED
DEC 24
ROBERT L. FORD, Clerk
DEPUTY CLERK

L.E. MORRISON,
Petitioner,
vs.
SUPERIOR COURT ETC.,
COUNTY OF SAN DIEGO,
Respondent,
COUNTY OF SAN DIEGO,
Real Party in Interest.

4 Civil No. 24342

SUPERIOR COURT NO. 339813

FILED
Robert D. Zumbrun, Clerk
DEC 26 1980
DEPUTY

THE COURT:

The petition for writ of mandate to stay petitioner's displacement from his property pending a determination of available relocation assistance and benefits, is denied.

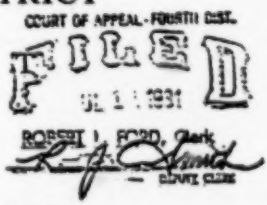
Acting Presiding Justice

APPENDIX 5

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

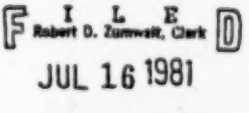
DIVISION ONE



COUNTY OF SAN DIEGO,
Petitioner,
vs.
SUPERIOR COURT ETC.,
COUNTY OF SAN DIEGO,
Respondent,
E. MORRISON, ET AL,
Real Parties in Interest.

4 Civil No. 24948

SUPERIOR COURT NO. 339813



THE COURT:

Partially because of the petition's failure to pray for a peremptory writ which this court could expeditiously have issued, and because the petition asks instead for an alternative writ the effect of which will consume much time and cost, we decline to exercise our discretion in correcting the superior court's obvious error in allowing the amendment to include goodwill. We defer our jurisdiction to the appeal, should there be one. The petition for writ of mandate and/or prohibition is denied.

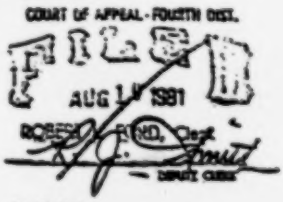
Brown
Presiding Justice

APPENDIX 6

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

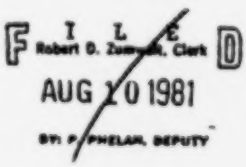
DIVISION ONE



COUNTY OF SAN DIEGO,
Petitioner,
vs.
SUPERIOR COURT ETC.,
COUNTY OF SAN DIEGO,
Respondent,
L. E. MORRISON, ET AL,
Real Parties in Interest.

4 Civil No. 26026

SUPERIOR COURT NO. 339813



THE COURT:

The petition for writ of mandate and/or prohibition is denied without prejudice.

Brown

Presiding Justice